IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CSX TRANSPORTATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	2:18cv530
NORFOLK SOUTHERN, et al.,	)	
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

(Hearing on Motion for Summary Judgment)

Norfolk, Virginia
December 1, 2022

BEFORE: THE HONORABLE MARK S. DAVIS
United States District Judge

Appearances:

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P R O C E E D I N G S

(Commenced at 10:03 a.m. as follows:)

COURTROOM DEPUTY CLERK: In Case No. 2:18cv530, CSX Transportation, Inc. v. Norfolk Southern Railroad Company and Norfolk & Portsmouth Belt Line Railway Company.

Counsel for the plaintiff, are you ready to proceed?

MR. HATCH: We're ready. Good morning, Your Honor.

THE COURT: Good morning.

MR. LACY: Good morning.

THE COURT: Would you like to introduce?

MR. HATCH: So I have with me at counsel table Mr. McFarland, Ms. Gollogly, our paralegal. We also have present today Mr. Brent Justus, Ms. Ashley Peterson and Mr. Cole Geddy, all from our Richmond office. And then Ms. Jeanne Noonan from our Norfolk office. And then on behalf of CSX Transportation, Erin O'Brien from the in-house counsel department.

THE COURT: All right. Which one is Erin O'Brien? Okay. Thank you.

COURTROOM DEPUTY CLERK: Counsel for Norfolk Southern, are you ready to proceed?

MR. LACY: Good morning, Your Honor. Michael Lacy on behalf Norfolk Southern. With me at counsel table is Ms. Tara Reinhart. Also with us, Mr. John Lynch and Mr. Alan Wingfield.

We have Ms. Megan McConnell sitting first in the row. Tommy Gentry. We have Mr. Mike McClellan, senior vice-president with Norfolk Southern, and Joe Carpenter, in-house counsel at Norfolk Southern. We also have Ms. Kathleen Knudsen from our office.

THE COURT: All right. Thank you.

MR. LACY: Thank you.

THE COURT: Counsel for Norfolk & Portsmouth Belt Line?

MR. SNOW: Good morning, Your Honor. Ryan Snow for the Belt Line. Just two people with me. I have James Chapman and I have Alex McDaniel.

THE COURT: All right. Thank you.

All right. Well, thank you very much.

I would like to make some rather lengthy introductory remarks that will hopefully help you in structuring your argument, and you may want to just take notes about the questions that I have, because I'm going to go completely through it rather than stopping after each of the questions, so that you have the benefit of completeness.

So I'm going to highlight some of my questions and my concerns with the case and then the law applicable to the case for the purposes of summary judgment. There might be sufficient genuine and material factual disputes to raise a jury question regarding whether multiple actions by defendants in and around 2009 caused significant damages to CSX based on CSX's inability

compete for certain intermodal contracts based upon my review of the record and the briefs. However, even assuming that such evidence proved an antitrust conspiracy, it may be that CSX was harmed as a competitor no later than 2009, with the record possibly demonstrating that CSX was aware of the harm it was suffering in and around 2009, yet CSX did not file suit until 2018.

Arguably, but for the continuing violation exception and additional conduct allegedly occurring in 2015 and 2018, CSX's antitrust claims would be time-barred as would its state law claims.

Considering defendant's more recent acts, CSX points to conduct in 2015 associated with defendant's purported intentional delays when moving a relatively small number of CSX trains to NIT, as well as certain acts by Norfolk Southern as a shareholder and/or by the Belt Line Board or its president in 2018. But for these two groups of events, the summary judgment record appears devoid of any overt acts during the five years preceding the filing of this lawsuit.

So zeroing in on some of my primary areas of concern, first, consistent with the Fourth Circuit's ruling in Charlotte Telecasters, it appears to me that the continuing violation exception is available to CSX in this case because the switch rates set in 2009 was not a final act excluding CSX from competing in the relevant market, as there were established

channels for CSX to seek a modification to the rate through the Belt Line Board and Rate Committees.

Second, on the assumption that the 2009 conduct was effective but not really final, the Court considers whether there were any overt acts during the limitations period that would allow CSX to recover damages. On that front, as to the 2015 conduct, the Court's preliminary view is that the acts of intentionally delaying trains or complicating physical access to NIT could be found by a jury to be an overt act in furtherance of the federal antitrust claims.

As to the 2018 conduct, the Court is less convinced. Importantly, the record does not appear to establish anything more than a corporate governance decision made by Norfolk Southern as a shareholder of the Belt Line, and the summary judgment record appears to demonstrate that Norfolk Southern's actions were in line with presently existing contract rights.

Although Norfolk Southern voted its shares to reject a change to corporate governance rules and voted its shares to reelect certain directors, it's my understanding from the record that this conduct occurred at a shareholder's meeting, and does not appear to reflect any action, nefarious or otherwise, by the Belt Line Board or the president of the Belt Line.

When counsel are addressing the 2018 conduct today, I ask that you be specific as to what the summary judgment evidence shows, as it appears that CSX's filing may conflate

actions taken at the shareholder's meeting versus the board meeting.

Furthermore, CSX's purported evidence of what occurred at the 2018 board meeting may be limited to a letter that purportedly recounts what occurred during such meeting, whereas defendants cite to deposition testimony and the minutes from the 2018 board meeting to demonstrate contrary facts. The Court, therefore, has questions as to whether any factual dispute is genuine.

Now moving on to the next area of concern, the third area, proceeding on the assumption that the 2015 conduct was an overt act, or, alternatively, that something occurring in 2018 could have been an overt act, the Court would next consider whether there was any new and accumulating injury from the highlighted acts.

As established by the Supreme Court's opinion in Zenith, the limitations period will start anew for damages caused by new acts within the limitations period, but a plaintiff may not bootstrap damages suffered as the inertial consequences from old time-barred acts merely because some new act created some modicum of discrete new damages.

The Court notes it's not averse to the legal theory suggested by CSX that the existence of an active -- and I want to underscore, active -- conspiracy or monopoly that is maintained during the limitations period through multiple

different acts may alleviate a plaintiff's need to tie specific damages to individual overt acts. However, when the overt acts are few and far between, potentially occurring only once during a five- to six-year period, and inflict only modest new damages, it appears that it would violate the anti-bootstrapping rule established by the Supreme Court in Klehr to allow a new overt act that creates specifically identifiable new but minor damages to permit recovery of an entirely different pool of damages that would otherwise be time-barred.

Drilling down on that point, it appears to the Court potentially that CSX may have pointed to evidence that is capable of demonstrating that it suffered two forms of new and accumulating damages in 2015.

First, as Belt Line customer, CSX paid an excessive rate to move a small but disputed number of trains in 2015, arguably, and it is plain that antitrust case law generally establishes that a customer-based overcharge claim would not be time-barred.

Second. As a competitor to Norfolk Southern, CSX purportedly lost business from CMA in 2015 that it had otherwise secured. The record suggests that the loss of business was temporary, perhaps several weeks, and the specific amount of loss would presumably be easy to calculate.

On this point, it appears to the Court that, while these damages could be recoverable under the continuing

violation exception and might not be time-barred, there are two potential roadblocks to recovery in this case that the Court would like to hear more about.

One. It appears that CSX did not identify the excessive rate charged by the Belt Line in 2015 as an overt act in its response to Belt Line's discovery requests, and any excessive rate was charged by Belt Line, not Norfolk Southern.

Two. CSX does not appear to offer a damages calculation or otherwise seek recovery for CMA business lost during a multi-week period in 2015 but, rather, seeks recovery for 100 percent of the intermodal contracts it allegedly lost due to its alleged exclusion from the market; an exclusion that, to the Court, appeared to become effective no later than the 2009 to 2011 time frame.

The Court therefore questions how CSX can proceed to a jury trial on its antitrust claims to the extent its damages model is predicated on time-barred conduct that excluded CSX from participating in the relevant market.

And here I'll make a brief reference to a footnote in the XY, LLC case that's discussed in the briefs, as the Federal Circuit in that opinion noted that the counterclaim plaintiff in that case had alleged only a single injury that resulted from the counterclaim defendant's conduct: Exclusion from the relevant market.

To illustrate this concern in a slightly different

way, CSX's own evidence viewed in its favor demonstrates that it was effectively excluded from the relevant market by sometime around 2009, and when CSX acted to move trains to NIT in 2015, CSX was still economically excluded from the market based on conduct occurring years prior. During the period of exclusion, CSX elected to move a limited number of trains to NIT at what it portrays was a short-term economic loss. Therefore, even if these trains had moved smoothly, CSX would have remained excluded from the market due to conduct occurring years prior.

Stated another way, the exclusion was 100 percent effective based on pre-limitations conduct, and no additional conduct was necessary by either defendant during the limitations period to further effectuate the total competitive exclusion from the market.

So I teed up my concerns about limitations and damages, but before I turn things over to you for comments on those reflections I'll offer a few additional questions, some related to what I've already said, and some related to the other issues that are presented here so that you can each address those.

First. Does CSX have the burden of proof on the limitations issue as to the federal claims? Typically, of course, the burden would fall on defendants. But when a plaintiff relies on the continuing violation exception to the

four-year antitrust limitations period, multiple federal courts, including the Tenth, Ninth and Sixth, as well as the Federal Circuit in a case arising in the Tenth Circuit have concluded that the burden falls on the plaintiff.

Next, second, does CSX seek to recover at trial for the damages suffered as a Belt Line customer due to the excessive rate allegedly charged by the Belt Line in 2015? If so, is this theory of relief barred by CSX's failure to identify this as an overt act in its discovery responses to the Belt Line?

Third. If the Court were to find that the only non-time-barred overt act is the obstructive conduct in 2015 and that controlling law precludes CSX from recovering damages based on acts committed before 2013 to include the establishment of the switch rate, has CSX somehow waived or otherwise relinquished its right during discovery to proceed to trial to recover for the temporary lost business in 2015, or in that hypothetical circumstance, should this case proceed to trial only on that limited damages theory?

Fourth. Assuming that I conclude that there is a jury question as to whether the 2015 obstructive conduct by Norfolk Southern is an overt act, is there sufficient evidence to create a jury question that the Belt Line participated in or is otherwise responsible for that conduct due to Cannon Moss's failure to push Norfolk Southern harder for windows to access

NIT and/or based on the emails he sent to Norfolk Southern in 2015.

Five. As to the state law claims I have several related concerns.

First. What damages were suffered by CSX as a result of Norfolk Southern's alleged breach of any contract provision in 2015? And, relatedly, if the only damages are the temporary loss of business in 2015, has CSX abandoned this theory of recovery during discovery? It's the same question as to the, that you alluded to earlier as to the federal claims.

B. Because the complaint identifies the purported unlawful acts underpinning the state law conspiracy claims, and many of the identified acts no longer appear actionable, CSX may be left with only an allegation of a state law conspiracy to breach a fiduciary duty as the identified unlawful act. Should the Court find there is no evidence of a wrongful act in 2018 by the Belt Line Board or its management, would the state law conspiracy claims be time-barred based on a two-year limitation period because the most recent potential breach of a fiduciary duty would be Cannon Moss's actions in 2015?

Six. Why isn't the definition of the relevant market a question for the jury, if the case makes it to the jury, based on numerous disputed facts like effectiveness of drayage, competitiveness of end-to-end trucking, port capacity implications on whether traffic can be shifted, the VIT's

involvement in directing port traffic, as examples.

Relatedly, based on the fact that CSX's clarification or narrowing of the claimed market was made in CSX's initial expert report and was still in line with the exclusion expressly identified in the complaint; that is, denial of rail access to NIT, is there really a need for CSX to amend its complaint, and if so, why shouldn't the Court allow that technical amendment?

Seven. Finally, the summary judgment briefs do not discuss injunctive relief, though it is sought in the complaint. Assuming for the sake of argument that I ruled in favor of defendants on the limitations issues as to money damages, would we still need a trial on the claims for injunctive relief, or is that no longer at issue in this litigation? If it remains an issue, does it make any sense to have a trial on injunctive issues in January, when the Surface Transportation Board rate case between Norfolk Southern and the Belt Line remains stayed, and the resolution of that matter will have an immeasurable impact on the competitive issues going forward between Norfolk Southern and CSX, as well as a new switch rate that would presumably be established by the Belt Line.

So those are the questions that the Court has. And perhaps because of the issues presented in those questions I should have CSX address these issues first and then have responses.

So who will be addressing this for CSX?

MR. HATCH: I will, Your Honor.

THE COURT: All right. It's a lot, Mr. Hatch. And I want -- I'm not taking anything away from you, but I want the answers to the questions from the people that may know the most about it. So if you feel that you want to pass off to someone else on any particular questions, feel free to do so. And I want you all to feel free to do that because, as I said, there's a lot. But I'm sure you've mastered it all, Mr. Hatch.

MR. HATCH: Thank you, Your Honor. We'll see. We'll see. I appreciate that opportunity. Good morning, Your Honor. Ben Hatch on behalf of CSX.

I provided, before the Court came out, some demonstrative slides, and I may -- I will address the Court's questions, but some of the slides we had preprepared do relate to some of those questions. So I'll bring those up for the Court's reference. The Court should have a paper copy there, and then also it will come up on screens. And we provided copies to defense counsel as well.

THE COURT: All right.

MR. HATCH: I'd like to start with the first -- unfortunately, the computer appears to be frozen. If the Court turns to Page 3.

THE COURT: Did you provide it to --

MR. HATCH: Yes, Your Honor.

THE COURT: -- your colleagues?

MR. HATCH: Before the hearing.

So this is the law. The Court, I know, has already addressed several of these cases, but I want to start with the statute of limitations, because that's where the Court started, and I have the Court's list, and I'll make sure I get to every one, but if I miss any, please interrupt and let me know.

THE COURT: All right.

MR. HATCH: So to begin with, Your Honor, we have the Zenith case we've cited right there, which I think is the most-directly-on-point Supreme Court case, talks about the continuing violation doctrine, and it establishes that as long as you have an overt act within the statutory period -- and I can talk about them, there's, I think, an additional overt act that I would add to the ones the Court walked through. So I will talk about that as well.

But as long as you have an overt act within the statutory period, then you can recover the damages from the monopolistic or conspiracy -- I might use those terms interchangeably, we have both types of claims here -- you can recover those damages for the period for the entire conspiracy or monopoly. So --

THE COURT: An accumulating injury.

MR. HATCH: Yes. Yes, Your Honor.

THE COURT: New and accumulating injury.

MR. HATCH: New and accumulating injury. So what did

Zenith say? "We confront the issue whether it's consistent with the controlling limitation statute to permit Zenith to recover all of the damages it suffered during the years '59 to '63" -- which was the four-year limitations period in the case -- "even though some undetermined portion of those damages was the proximate result of conduct occurring more than four years prior to the filing of the counterclaim. HRI contends and the Court of Appeals held that the statute permits the recovery only of those damages caused by the overt acts committed during the four-year period. We do not agree."

So that's Zenith. You get all the damages during that period.

Why does that make sense? I go back to the nature of the causes of action here, Your Honor. Monopolization, the cause of action, is establishing or maintaining a monopoly. You don't just establish a monopoly, then if you were successful you want to maintain that monopoly. And so during our four-year period, that monopoly was maintained. And in Zenith, the damages in Zenith were measured the way we have gone about them in this case, which is essentially a market share proportion evaluation. And I can talk more about our damages. But they looked at the market share that the company would have had during that '59 to '63 period, if -- but for the preclusive conduct, but for the monopolistic conduct, and the Supreme Court allowed all those damages in that four-year period, as we see,

not just the ones that flowed from specific overt acts because, as we have in the law, it's the overt act -- the way I would urge the Court to view it, the overt act maintains the conspiracy within the limitations period. In other words, if you could show no conduct within the limitations period then you would have a statute of limitations problem. The overt acts maintain the cause of action within the limitations period.

Then the question -- then you have a live cause of action. What's your cause of action? Ours is for conspiracy and monopolization to block you, and you get the full scope of damages, as we say -- Lower Lake Erie says that very clearly. Lower Lake Erie walks right through the Zenith analysis. And it's very clear, Zenith says you get the full scope of your monopolistic damages during the limitations period. So I think those cases are very clear.

The Court mentioned Klehr. So let me talk about Klehr. Klehr came later, of course. It's a civil RICO case from the Supreme Court, but it is applying in one aspect, or is relating to the Clayton Act since they share the same statute of limitations. But I think Klehr is actually helpful. Klehr stands for the proposition if what hurt you only occurred originally -- and I know the Court had some questions about what happened in 2009, so I'd like to come and apply that. But if what hurt you only happened originally and you're just suffering the consequences of that for several years, then that's not

going to refresh the statute of limitations.

An example of that would be I take a pill in year one, it's a bad pill, it's going to hurt me for 10 years, I didn't take more pills, I'm just suffering the unabated consequences in years, six, seven of having taken that pill several years ago. And Klehr was a bad silo. They bought a bad, allegedly defective silo in year one. They said that's silo has continued to spoil our grain and do other harms in years later. That is the unabated conduct of having bought a bad silo in year one. Okay?

What do we have here? It is not -- yes, there was conduct in 2009, certainly, and the Court has seen that in our brief and we learned about that in discovery. But that conduct is blocking us from NIT, okay? That happens every time we're not able to access NIT for business. And that conduct has occurred each year, each day they have maintained that switch rate since. It's not -- we didn't buy a silo in 2009 and then we just have bad grain. And this is a key point, Your Honor, that, I think, is critical on understanding the interaction between Zenith and Klehr: Zenith also said it's appropriate for them to get that full scope of damages in the statutory period, because it would have been speculative if they had tried to sue on all years on day one.

So let's take the Court's question and go back to 2009, and let's say we brought the suit that we have brought now

in 2009 and sought damages for the years all the way up to 2022. They would have said that's entirely speculative. And it would have been. Why would it have been speculative? Because they could have decided, just like they could decide now, to lower that rate at any point. If they lower it to an economical rate, if we're able to get the access that the antitrust laws and other laws say we should get, then that, that abates the conduct, right?

So let's say we sued in 2009 and sought these years of damages, and then the next year they lower the rate? That would have changed everything.

That's what Zenith is saying. It's speculative to sue on the full -- whereas with the silo it's not speculative. You've got a bad silo, you know what the useful life of that silo is going to be, you can have experts talk about, you know what you're going to use it for, and therefore you could have sued within the original statutory period for whatever your expected damages are from purchasing that silo.

Here, every year, every day, we want to get into NIT, they maintain that rate, that blocks us from NIT. That's another critical difference, right? Maintaining the monopoly. They could at any point decide to charge a lower rate. And we have specific points that we've teed up in the brief. But they could any day say, do you know what? We like that business, we'd like to charge an economical rate and reduce the rate. And

so the decision to maintain that rate are new decisions, if you will. It's new preclusive activity throughout the whole period.

Now, why does that -- the Court had several questions about the overt acts, and I want to come to the specific ones the Court talked about and add the one.

But why do the overt acts that occurred, why are damages not just tied to those specific overt acts? And it is true our damages are based on our essentially projected share of business we would have but for the illegal conduct that we've alleged in the complaint. It's because it blocks us from our customers. And our customers demand service through a portfolio of ports. And if you're not able to offer the service at NIT, then you're not able to compete on fair terms for those customers that use NIT intensely. That's what our expert has analyzed.

So by not being able to compete on fair terms, that's known. Let's take 2015 and what happened there as an example.

It was very clear that we were not able to move trains in a timely and reasonable manner into NIT when we should have been able to. The Court already talked about the one specific customer that had an impact on, but that impacts the whole business, because it's seen, it's known that we are having trouble serving NIT by rail. And our witnesses talk about how that impacts them and their efforts to get business.

And so that's why 2015 is kind of a showing of the

problem to all the world, to the customers, of not being able to get rail access into NIT. Norfolk Southern is moving multiple trains daily, and the witness accounts vary of how many trains CSX moved in that time, but it was a very small number over the course of months.

So customers are going to see you can't really move trains in there in any kind of efficient way. When they're trying to move freight, they don't want it sitting there for weeks or months, they want that freight moved to its destinations. And so if you're not able to access the on-dock rail efficiently, then you're precluded, you're harmed in your business.

So the 2015 relates to much more than the CMA/CGM account.

And if my answers trigger more questions, I hope the Court will feel free to interrupt me.

Let me turn to the overt acts within the statutory period. Certainly there is the 2015 event. And I will say, Your Honor, in our interrogatory responses -- because that was a question the Court had. First of all, in our complaint in Paragraph 55 it said we paid the rate in 2015. So I think that's been entirely clear from day one in this case that we, that paying the rate in 2015 was an aspect of our case.

In our interrogatory response -- and this is to NPBL's interrogatory No. 4, in which our answers -- excuse me.

This was supplemental answer per order of September 4th, 2020. We said "NPBL has charged and continues to charge this unreasonable and prohibitive rate today despite NPBL's declining revenues and precarious financial position."

So it may be in a long interrogatory response that does also talk about the 2015 event, we didn't specifically then go say and of course that also means we payed that rate that day, but I think the interrogatory response covers that, of course, paying that rate is part of our case. It is one of the overt acts. There's a constellation of overt acts around those movements, not just paying the rate, it's really also the slowness of it. There's also conspiratorial conduct where Mr. Moss is telling Norfolk Southern's salespeople about our movements. They have no need to know that. Mr. Luebbers is who he talked to. So that shows conspiracy in that time frame.

But returning, so that's 2015. And I know the Court talked about 2018, but let me come to conduct that happens in between 2015 and 2018. And if I could direct the Court to Slide 4.

THE COURT: So can you read me what Interrogatory 4 was?

MR. HATCH: Yes, Your Honor.

"Identify the specific overt acts by NPBL that you contend form the basis of the conspiracy alleged in Counts 1, 2, 8 and 9 of your complaint, including the identities of the

specific persons who you contend committed such acts, the dates and circumstances of such acts, and all documents that support your answer.

THE COURT: And your supplemental answer stated that NPBL had continued to charge unreasonable and prohibitive rates and you treat the continuing charges as the overt acts?

MR. HATCH: Well, there's a lot of other information, but yes, Your Honor, I think that covers it. In conjunction with our complaint that lists paying the rate in 2015 as part of our complaint. So I don't think there's any notice issue. I mean, that was in our original complaint, that -- I think the record is that there was one train that was moved not really for freight purposes over NPBL outside of this 2015 period. So literally the only time that there is --

THE COURT: Is that the 2010?

MR. HATCH: Yes, Your Honor.

THE COURT: Okay.

MR. HATCH: The one that was kind of done for demo purposes, if you will. So really the only time that we paid the rate other than that one instance in 2010 would have been in 2015 for those trains.

THE COURT: Okay. Go ahead.

MR. HATCH: I had just come back on that one, Your Honor. I do think the interrogatory covers it. But there are other overt acts in the 2015 evolution beyond just the rate. So

I don't think at the end of the day that's material to whether 2015 counts as a within-statute overt act.

THE COURT: Okay. And then you're going to address the damages component of what you're seeking, which is critical?

MR. HATCH: Yes.

THE COURT: Which is critical here?

MR. HATCH: Yes, Your Honor. But if I could walk through the overt acts first then I'll come to the damages --

THE COURT: Yes.

MR. HATCH: -- in the order that the Court did it.

So if the Court still has the demonstratives in front of it, if the Court turns to Page 4. So this is just a list, and these are in our brief as well, of some of the conduct around that 2015 movement of trains over NPBL. But the last bullet on the list says "NS moved to cancel Norfolk & Portsmouth Beltline's existing trackage rights two months later." So that's the intervening event between the 2015 movements and then the 2018 service proposal that is also overt acts is these actions to cancel the trackage rights that NPBL has.

And we see what does Norfolk Southern do? We move a modest number of trains over a long period of time in 2015. That's one overt act, or constellation of them. Norfolk Southern couldn't stand even that. And so what we see, they then immediately move -- and if the Court turns to the next page, that's a email within Norfolk Southern where they're

now -- this is in 2016 but the idea for this happened right after the 2015 movements. They did not want CSX trains on NPBL coming into NIT, as they had never wanted, now they're saying let's, NS, "to curtain" -- that might be "curtail, but -- "curtain NPBL's use of NS's tracks" -- that's the trackage rights agreement -- "and then inflate the rate as much as we can."

So that was the idea hatched in the wake of even the modest number of trains moved in 2015. Is let's yank the trackage rights agreement, inflate that rate higher so that it's even harder for NPBL to ever even try to move a train into NIT.

And that goes on then over 2015, 2016. And on the next page we have testimony from Mr. Moss of NPBL who says ultimately Norfolk Southern wants -- according to his calculation, the historic trackage rights agreement that had existed between them was, amounted to about eight dollars per car for the trackage rights. Norfolk Southern is now demanding seventy dollars a car. And NPBL is offering thirty dollars a car under those trackage rights.

So even under NPBL's, which is supposed to be helping its two owners, which CSX is one, even under NPBL's proposal they were proposing multiples of the existing trackage rights amount. So they were on board with increasing this with Norfolk Southern. Norfolk Southern wants almost 10 times the existing amount.

And this is playing out in 2016. And that was also in our summary judgment opposition, I believe, starting at Paragraph 56. This evolution of acts.

As the Court knows or may recall from the motion to dismiss stage, this ultimately -- and this is also in our complaint -- that they threatened pulling the trackage rights agreement as part of the acts. So it was in our complaint. It's an overt act here.

This ultimately results in that STB proceeding that the Court had referenced before, where there's a, supposedly, I'm going put air quotes, "dispute", between Norfolk Southern and NPBL about what trackage rights fee NPBL would pay for its trackage rights, and those trackage rights are necessary for NPBL to access the NIT terminal.

And that dispute is still pending. I say -- I put air quotes around "dispute" because, as the Court also knows, they have now separately claimed to you that they control NPBL and they said that to the STB. Not just legal control but that they actually control them. How it is that they could have a legitimate litigated dispute between them when they also take the position that they have controlled them for that whole time I don't understand. Perhaps that dispute was just a manufactured dispute to provide another reason not to let us in. But that's not just inference. That is actually what happens.

So if we go to the 2018 proposal --

THE COURT: This is Page 7?

MR. HATCH: This is -- yeah, it's starting -- thank you, Your Honor. Starting on Page 7.

And this is still an internal NS email to Mr. McClellan, who is here today. This is Norfolk Southern reacting to that proposal. And it says the combination of high tariff rate -- there's a lot in our briefs, Your Honor, about how this rate's great, you know, it's not high, there's nothing -- you know, covers our costs. Their own documents, everybody in their own documents calls this tariff rate high. I'll come back to that. But even Norfolk Southern calls the NPBL tariff rate high in their own documents.

"The combination of the high tariff rate and the proposed trackage rights rate" -- that's, you know, air quotes "dispute -- "make it economically difficult for CSX to access NIT via NPBL. And NS would also dictate operating windows" -- that's what we saw in 2015 -- "adding additional complexity to the NPBL access."

I mean, if that's not direct evidence of monopolization and attempts to preclude competition, I don't know what is. That's what they're doing in response to our 2018 proposal.

Mind you, NPBL has trackage rights that are approved to go into NIT. So it's not a question. They say, NPBL's own testimony, is that those rights give them 50 percent of the

tracks in there. Fifty percent. And the whole statutory time we've moved a handful of most trains. Again, witness accounts vary.

THE COURT: Right. But at NIT these proprietary issues that we've heard discussed or that are referenced throughout, I'm sure they can be exaggerated, but does CSX really dispute that there were proprietary issues, issues of traffic flow, the absence of the complete joining -- you come -- the north -- north is different than south. The south there's no rights there. So I mean, those are very practical problems. And I don't deny what I've seen here from 2009 and forward. I don't deny any of that. But on this point that you're addressing, there certainly are some very practical problems that would be encountered.

Now, I take your point about how they may have used those, but you don't deny those practical issues, do you?

MR. HATCH: What I would say, Your Honor, is certainly you need to manage the network flow of trains on tracks. You don't want two trains colliding, or accidents. So there's no dispute about that.

There is a dispute of fact that we weren't going to the jury about with whether those proprietary issues which are not explained by them, the so-called proprietary issues, were just a front to not let us in. And I've got another document in here, come to in a minute, but within six minutes --

THE COURT: Is it just, is this just one rail line?

MR. HATCH: It is.

THE COURT: It's not two rail lines side-by-side?

MR. HATCH: Correct.

THE COURT: It's just one rail. Two rails, in other words?

MR. HATCH: One rail line, and then when you get close to NIT there becomes a loop, and that's the south and the north. And that's what Your Honor alluded to, that Norfolk Southern can go around that loop and NPBL would have to go in one way and then come back out. But both of them access NIT.

THE COURT: So once you enter NIT you're saying there are two rail lines?

MR. HATCH: My understanding is that if this is -- if I'm drawing the rail line, it comes, loops up within NIT and then comes out and then reconnects. So it's a loop at the end of a rail line.

THE COURT: Yeah, but I mean they're not two parallel rail lines, that's what I'm asking.

MR. HATCH: They're not.

THE COURT: In NIT there are not two parallel rail lines?

MR. HATCH: My understanding is it's not.

THE COURT: That reality is part of what you're acknowledging is a traffic flow problem?

MR. HATCH: That -- yes. You would not, you obviously don't want two trains going in different ways on the track, at the most simple level. But the jury, with these documents, would be entitled to find that the reference -- again, keep in mind, Norfolk Southern moves multiple trains every day into NIT. NPBL says we have the right to 50 percent access on that track. That's what their trackage rights agreement is. So if they're moving multiple, 50 percent, you know, whether it's one, two, however many they're moving should be what NPBL's able to move, and you work through whatever the logistical issues are like in any rail operation where you're moving trains. And here, it's not a matter of they moved three and we moved one in one day, it's they're moving multiple, day after day. And there's witness testimony they only moved one of our trains. Some people say there's more. I think there's a dispute of fact around that. But over months we only got a couple trains in there. So I think a jury would be amply entitled to say these reference to proprietary issues, yes, of course there can be, but this was a reference that was done as a means to block.

THE COURT: What does it mean if there are -- if traffic flow at NIT container traffic has increased, vessel traffic concomitant has increased, to the extent that with NPBL not having circular, completely circular rights, it compromises the ability of NPBL or -- Norfolk Southern to provide 50 percent. What does that mean to this, to the case and to

your claim? That is, if you were exercising your rights over the NPBL track, you enter at the north gate, come alongside the dock, and then you have to exit --

MR. HATCH: Back out.

THE COURT: -- backwards. And the 50 percent agreement -- if Norfolk Southern is unable to meet its obligations with the increasing traffic, how does that -- how do those practicalities and these proprietary interests impact your claim?

MR. HATCH: Well, first of all I would say that is not something that's established in this record. They said proprietary issues, that there were actual proprietary issues. I mean, that would presumably be for them to establish. And there is at least a triable issue on whether that was just said as a front or not.

And I would add to that, Your Honor, there's also in our brief VIT, which of course operates NIT, Mr. Capozzi, who is the witness for VIT, and CSX witness Mr. Gerardo both testified that railroads can manage this pattern at other ports. And Mr. Capozzi said that NS concerns were exaggerated about the proprietary issues -- or about the movements, that is. That you couldn't do the movements.

So this is why I said this is disputed fact. They said it. If they want to come and try to call witnesses, it's just you can't square that -- it's impossible -- keep in mind,

that's totally inconsistent with one of their other defenses, which is we were here ready to operate and send you in whenever you wanted to pay the rate. That's NPBL's position. Happy to do that whenever you might pay the rate.

THE COURT: Might say can't do 50 percent, but they're ready?

MR. HATCH: They haven't -- yeah. Whether it's 50 percent -- I don't want to get hung up on that, Your Honor. That's what they say their rights are. They have never come to one percent, okay? So we're not even close to whether it should be 40/60 or what have you. They don't move any trains in there. But their position is that we completely can move trains in. When Mr. Reinhart who is the head of VPA at the time asked them to lower -- and this letter's in the record, it was with our complaint -- asked them to lower their rate so that there could be dual rail access, Mr. Moss's response was we're happy to do the business at the rate we have. We're not lowering it. That was in 2018 as part of this service proposal.

So it's a fact and it's acknowledged that we have a right through NPBL switching to access NIT, that's one of the terminals that they connect to, and that we weren't meaningfully able to do that in 2015, and that these trackage rights are being torn up by Norfolk Southern and NPBL with a mutual goal of increasing the amount that would be spent, which is, as the Court has identified, they haven't finalized that, but almost

certainly then be used, we see from Norfolk Southern's documents, to justify higher rates. And that is conduct that occurred 2015, 2016.

And then coming to 2018, as Your Honor talked about, our proposal, yes, there is a governance aspect to the 2018 proposal, but there was also the service aspect to the 2018 proposal. Offering a rate. And one of the things -- this is on Page 8 of the demonstratives the third bullet point -- Mr. Moss testified that he cannot analyze the service proposal in depth given the trackage rights dispute with Norfolk Southern. In other words, I don't know what I'm going to have to pay, so I can't, you know, I can't answer this question, I've got the trackage rights dispute out there.

So that thread from '15 really stretches all the way up to '18. We see here behind the scenes what's going on, and the Court can know that that is a manufactured dispute, at least according to their own representations, because they have said that they controlled them throughout this entire period.

THE COURT: And you're saying the trackage rights dispute is the proprietary issues? How would you define it?

MR. HATCH: I would define -- no, I would say the proprietary issues, Your Honor, were identified a few times I think in the record, but primarily is as a reaction when we tried to move trains in in 2015. They said proprietary issues, we can't tell you why we can't move your trains, okay?

Then from the few trains, one or, you know, somewhat more, witness accounts vary, we moved in 2015, Norfolk Southern immediately says internally let's rip up that trackage rights agreement with NPBL.

So that's, to me, separate, but it -- you would tell this all together to the jury, right? Because they didn't even like the few trains we moved in, they couldn't stand it, so they say how else can we block them? This is part of the monopoly, part of the conspiracy. How else can we block them? Oh, I know. The reason NPBL can get into NIT is by virtue of trackage rights that have existed at this point for over 100 years.

THE COURT: That they wanted to end.

MR. HATCH: 100 years at eight dollars per car, and then all of a sudden when we move one train or a small number of trains, now it's time to reassess the trackage rights agreement after 100 years. I mean, that is remarkable. And you don't even have to guess why it came to them. That's the documents we have that show right after that event let's rip up these rights. And so then they proceed to do that.

And this ultimately culminates in the disputed, air quotes, "dispute" in the STB between Norfolk Southern and NPBL over what rights. And that's perfect for them, right? Because this dispute can go on who knows how long? You know, it could be supposed litigation between one party that controls the other, according to them.

And then Mr. Moss tells us in our 2018 proposal, well, I don't know, that's uncertainty hanging over whether we can move, you know, do this deal, because I don't know how much I'm going to have to pay.

So I think -- I hope I've answered the Court's questions, but that is connective tissue. And I think it's also an example, Your Honor, of an overt act that is not tied to a particular customer. And it just shows they are intent on blocking us from NIT from any customer that wants to go there. They will do it by not moving trains, they will do it by ripping up trackage rights agreements, and then when we come to 2018 they will do it by -- so for 2018 -- Your Honor's questions were focused on the shareholder vote, and I'm happy to address the shareholder vote, but an overt act is any act in furtherance of a conspiracy. It's not just the ultimate act. They like to focus on the shareholder vote, we were entitled by our rights to vote the way that we wanted to vote. You know, it's not just the ultimate vote. As the Court knows, I mean any overt act, making phone call can be an overt act in furtherance of a conspiracy.

So what do we have in 2018? Well, we have what I was just talking about with Mr. Moss saying I've got these trackage rights dispute going on, I don't know, and I'll have to send it to a rate committee. Your Honor, I mean, we know what a rate committee does. That's from 2009 and 2010. That is just

another way to delay and deny.

And they may argue, no, it could have been an open and fair process. That's fine. That will be for the jury to decide. But he says no, we're going to have to send it to another rate committee.

By the way, I have another slide on this. Every time NPBL analyzed internally whether they would make money on their proposals that CSX put forward, so in 2009/10 and also in 2018, every time they concluded that they would make money on CSX's proposals. And this Court said in the motion to dismiss decision, "Although ultimately a merits question, courts have found that rejecting proposals which are in a company's own interest and within the company's power to accept may be evidence of, for instance, an antitrust conspiracy." That's at Page 27 of the Court's decision.

That's exactly what we have here. Imagine a world in which NPBL acted like the independent company it's supposed to be, helping its two owners connect to terminals, when they get a proposal in 2018 by which they would increase their business, make more money, by their own account, they would endeavor to advance that proposal. We do not see that happening. We see barriers erected to it. We see, you know, well, we got this trackage rights dispute. We see them responding, you know, no, we are not going to lower our rate to the port. So there's also the proposal side, Your Honor, I guess is what I'm saying. It's

not just of the shareholder vote.

Now, about the shareholder vote, generally of course if you have a contractual right to do something, then you can do it under contract. But you cannot engage in anti-competitive activity. And you can use contracts to engage in anti-competitive activity. For example, a classic antitrust case is a patented product that is going to expire its patent, it engages in settlements with generics, and by doing that, extends its monopoly. Well, it's totally lawful to engage in a settlement generally, and it would be totally lawful to enforce the terms of that settlement. But when that is done pursuant to a monopolistic conspiratorial enterprise, it is just the same overt act as any other overt act in furtherance of it. It goes to their motive and intent, not whether they abstractly had, if they didn't have those motives and intent, the right to do it.

Just taking a moment to look over the Court's notes, if that would be okay?

THE COURT: Sure. Take your time.

MR. HATCH: And there was -- I think this is, this was in our summary judgment opposition, Your Honor, but there was more conduct even at -- the Board refused to consider the different proposals as well. That is in our summary judgment opposition. There wasn't ultimately a vote at the Board level, but there was refusal to consider or advance the proposals at that level.

THE COURT: Did the CSX members affirmatively raise it during the meeting?

MR. HATCH: Yes, Your Honor. And I'll pull up our opposition if I could here.

THE COURT: They made a motion?

MR. HATCH: They did not -- so that's their point, and we concede it was not put to a vote. But on -- our position was, our position was we know -- we can see where this is going, right? The things you're already raising, rate committee, we know that was used before to ultimately go nowhere and advance the issue. The trackage rights dispute, that was clearly a pretext for this. And so there needs to be somebody independent who evaluates this fairly. And ultimately at the shareholder level that was voted not to have independent. But at Paragraph 71 of our opposition at its April 18, 2018 meeting, the NPBL board did not discuss the 2018 proposal and did not vote to form a rate committee to analyze the tariff or the proposal. The CSX appointed directors requested that the Board appoint an independent committee to review and evaluate the 2018 proposal, but the NS appointed directors refused, based on purported quote-unquote 'conflict' with NPBL's governing documents." So there was also discussion at the Board level, albeit not a formal vote.

THE COURT: Thank you.

MR. HATCH: So ultimately I return Your Honor to the

point that the whole purpose of this monopolistic exercise in the conspiracy is to keep CSX out of NIT. That is maintaining the monopoly. And it is also doing it through a conspiracy that hurts NPBL; would not be in its own independent interests. And that's evidence of conspiracy.

There were multiple overt acts within the statutory period, and those overt acts had the effect of precluding us from that market, which our expert has analyzed. And the effect of precluding us from that market is the damages our expert has calculated. And I think that's the damage approach and model that was approved in Zenith. Zenith does say, you know, you're entitled to damages from that overt act, but it is not limited to specifically that overt act. It approves the market share damages that were claimed in that four-year statutory period.

And Lower Lake Erie walks through that and confirms that when you're talking about a monopoly that is set up and blocking you and continuing to do so and refusing to, you know, to deal, essentially, that that is precluding from the market, and therefore you're entitled to your market damages, not just the specific damage from a specific overt act.

And Your Honor asked about the XY, LLC decision at one point, and the --

THE COURT: Yes, how is -- distinguish their determination there was no new accumulating damages.

MR. HATCH: To me, the distinction is that -- and the

cases talk about this -- it's one thing if the monopolist destroyed your business on day one, right? That could be a form of monopoly. There's two competitors and this monopolist sends you into bankruptcy. Destroys your business. Okay. Fine. You know then you're done, your damages would be looking forward from there because you're done as a business.

It's different though if they don't destroy you as a business or do a one-time act. Again, taking the pill that hurts you still in year seven just like it hurts you in year one. They continue to do new things. They continue the conduct that precludes you from that market year over year. I mean, that's what you have to do as a monopolist. If you haven't killed your competitor, you have to continue to block them year after year.

And Hanover Shoe, Zenith, all these cases say, okay, maybe you can't recover for the out-of-statute damages, but what we're not saying is that a monopolist who succeeds in not being sued in the first four years of that monopoly gets penchant to continue the monopoly into the future and not face the damages they're doing to the market. All the damages that are within the statutory period are recoverable. And that's, between Hanover Shoe and Zenith, I think exactly where we are.

THE COURT: And so how is this case different from XY? Are you saying XY is wrong?

MR. HATCH: No, I'm not saying XY is wrong. Ours is

not a single act. Your Honor, in your introductory statements, said in 2009 arguably a rate was set and a rate was denied. They set 210 and didn't do the 75 that we were asking for, and has it just been that conduct that has carried through this whole time and been what is attributable to our harm? And the answer is no, it's not. Because they could have at any time between then and now decided to lower that rate. And in fact we made in 2018 an effort, again, to get them to do that. They did not. So by persisting in the rate, they're deciding to maintain and establish and charge that rate each year, causing the market damages.

And that is where I go back to Zenith, which says it would have been speculative and unavailable to us to sue for a decade's worth of damages in 2009, because they would have said you haven't accumulated those, you don't know what will happen, we could change the rate tomorrow, so it's speculative. That is certainly what they would have argued, and in Zenith the Supreme Court said, yeah, you don't have to face front-end inflative damages when they can change the conduct, which in that case was precluding you from the market, just like it is here.

Your Honor asked about the burden of proof issue on the affirmative defense, and I will confess, Your Honor references cases from the Tenth, Ninth, Sixth and Fed Circuits. I don't believe I have seen those, I'll confess that. So I probably can't speak to them well because I don't believe they

were relied on by either of the defendants.

They didn't acknowledge they bore the burden of proof on this in their opening brief. We pointed out in our response that, as an affirmative defense, they bear the burden of proof on it and I don't believe they have contested that point. If I'm wrong, I'm sure I'll be corrected. But that's a key point, because we see a lot of these cases, Zenith is an example, but many of the other cases are assessing the statute of limitations issue post-trial. And in Zenith in fact, there was no statute of limitations -- that was a bench trial. There was no statute of limitations defense made at trial, then the defendant lost, and after trial they tried to amend their answer and assert a statute of limitations defense. And the Supreme Court commented that that could very well have been a tactical decision on their part not to assert the statute of limitations. Why? Because it would be hard to tell a jury we didn't do it, but if we did it, it was too old. Which is exactly what they're trying to tell the Court. Their first argument is we did it and it's too old, and their second argument is there's no evidence of a conspiracy. Those are a bit hard to square, but that's how they're proceeding. Will they assert the statute of limitations defense to a jury on which they bear the burden of proof? I don't know. If they do, then I think the Court at trial could determine after hearing the evidence what the scope of that was in terms of which years are within the damages period. But it's

on them to assert it. If they don't assert that affirmative defense, which they could decide not to do tactically to a jury or for other reasons, then there's no statute of limitations defense. It's a damages issue ultimately that goes to the jury. Or for the Court to decide during jury instructions.

I would say as to the -- and again, not having read the cases that the Court referenced, yes, we will need to establish at trial that this was a conspiracy and monopolization that occurred. If they, if they assert a statute of limitations and put forward evidence on that, then we would have the fight about whether it was continuing within the statutory period and that sort of thing. There's certainly ample evidence in the summary judgment record that it was continuing; that it was a continuing conspiracy. It's the same two parties, there is continuity of persons over time, there's continuity of objectives. So I don't think there's really a serious dispute about whether it was -- there's triable evidence about whether it was a continuing conspiracy and they haven't claimed that they don't bear the burden of proof on the affirmative defense.

The Court asked kind of a series of questions about what damages we are claiming here. And they're not, as is probably clear from my prior discussion, but they're not limited to the specific moves in 2015 and the differential between what the rates should have been and what it was. They are the lost business and profits that we had by virtue of this conduct. So

we have not at this point in the case separately calculated what the specific lost business was in 2015. I mean, I think we've claimed all available damages, but we haven't endeavored to calculate that because, frankly, our damages are much broader. And one thing we, as the case developed.

THE COURT: But are those damages tied to an overt act within the limitations period --

MR. HATCH: They are.

THE COURT: -- such that it's an accumulated, it's accumulating?

MR. HATCH: They are, Your Honor, because again, the damages are all tied -- and this is in our expert's report -- to the loss of customer business by virtue of our inability to offer on-dock railing at NIT. These customers evaluate -- you are based on your ability to offer on-dock rail. Don't take our word for it, that's clear in their own documents. They like trains to be able to pick up right where they drop off. They don't want to have to use trucks and the railroads can't tell the customers where to go, they've got to take the business as they find it. So if we cannot offer on-dock rail, which is made evident by all the difficulty in 2015, by the continued use of a rate which is preclusive, and by the refusal in 2018 to consider any other rate, and the continuation, then that's evident in our basis. An again going back to Zenith and Lower Lake Erie, this is the preclusive effect within the market. You could certainly

calculate sub-aspects of those damages if you could calculate for a specific train move, but calculating lost business, lost market share is a common way to prove damages in an antitrust case.

And I go back -- I think Your Honor referenced in the motion to dismiss ruling that we're entitled to expectation damages, which is what plaintiff's profits would have been if defendants had accepted the proposal minus what plaintiff's profits actually were. And that is how we're establishing our damages. If you let us in, if we're able to provide on-dock rail service at NIT, then we would have this market share, this amount of business, you haven't throughout the statutory period, and therefore these are our damages.

Your Honor asked a question about NPBL's participation in the conspiracy within the statutory period, and I have touched on that already with some of Mr. Moss' activity, but I do want to make sure I respond to that one.

So in 2015 when where trying to move those trains, Mr. Moss keeps Norfolk Southern's Chris Luebbers, an intermodal salesperson, apprised of our attempt to move them in. There is no basis -- or at least the jury should determine why he did that. It's a salesperson, it's not -- Your Honor asked about proprietary issues. He doesn't run the trains, he never had an operational job, his only job is to sell Norfolk Southern's intermodal material. And the record is replete with his efforts

over the years to keep us out of NIT. So the jury could easily infer conspiratorial communication between Mr. Moss and Mr. Luebbers in that 2015 time frame.

Another one, Mr. Moss in the 2015 time frame asks about an operational window, and I believe within six minutes of being advised that NPBL was asking to get an operational window, the vice-president of transportation for Norfolk Southern, the vice-president of transportation, not a low-level person, Mr. Terry Evans, wrote Cannon Moss, What is this and what are the details, and until I fully understand, the answer is no, exclamation point.

I mean, does that sound like 50-percent trackage rights? Does that sound like 40-percent? You know, it sounds like nothing. That is what it is, okay?

Then we get the proprietary issues and we have Mr. Capozzi's testimony in this time frame as well, which I already referenced to the Court.

We have the fact that -- sorry, I have the wrong page.

We have a slide on this, actually. Every time NPBL has evaluated our rate proposals they have determined that they would make money. Ms. Coleman did so in 2018. That was her testimony. Let me see if I can find that.

THE COURT: I've read it.

MR. HATCH: You've read it. Okay.

So they have evaluated that they can make money. I

always keep in mind what would a business that wasn't engaged in conspiracy, that was trying to do the right thing do? We can make money? Great, let's move forward with this business opportunity. We're not going to erect road blocks: Rate committee, trackage rights fees, et cetera.

And then of course there's the trackage dispute that I already talked about, Your Honor.

So I think there is that connective tissue across all three of these. Mr. Moss was actually put into position by Norfolk Southern as president of the NPBL after the former president, Mr. David Stinson had actually evaluated, in the 2009/'10 period, that NPBL would make money. And it's really remarkable. I know the Court's read the record. We proposed 75, which is actually what they had proposed. NPBL, after saying we looked at what other comparable rates were and this is the rate that works for our worse-case scenario, so we said great, we'd like the 75. Mr. Stinson went to the board and said, yeah, we would make money on that rate. Norfolk Southern says you need to think about that more, I'm not sure you've really considered a worst-case scenario.

Mr. Stinson goes back -- you know, I think they were trying to send a message. Mr. Stinson goes back, runs the numbers again, he said nope, we'd still make money. They say, have you considered -- because we were offering to give them our trains. They would have free trains to move it in. Well, if

you don't use their trains would you make money? He comes back, we would make money whether we used their trains or not. He raised that. It goes nowhere over a long time thanks to Mr. Luebbers' and thanks to the Norfolk Southern Board members and thanks to other Norfolk Southern people who were defending their position.

He is removed after that and Mr. Moss is put into place, and then Mr. Moss is the one saying to us in 2018, well, I think we better do a rate committee.

I think a jury is certainly able to draw their inferences about where that's headed and what was going to happen with that.

Thank you, Your Honor, for your indulgence.

Mr. McFarland reminded me of one more note going back to 2015, and this relates to some of the state law claim questions as well that the Court asked.

The reason we tried to move trains in 2015, and I don't think this is disputed at all in the record, it was a time of incredible port congestion. There was some extraordinary events going on and so there was an extraordinary need to try to service customers even at a loss for us. At that rate we would lose money, but in the extraordinary circumstances to try to service that. And Norfolk Southern then is not cooperating. They're not moving those trains and they're not allowing them to run, and so therefore that is a breach of the contract on their

part because again, NPBL is entitled to those trackage rights. It's entitled to be able to send trains in and Norfolk Southern is not letting them come in. And it's not letting them come in -- you know, if you're a customer and you're looking at that, you know, here I really need you to move these trains and you haven't done it before, and what I'm seeing is that you can barely move anything, and you certainly can't do it in a timely manner. And so that is going to impact our business, again, much more broadly than that particular move because it just demonstrates that you can't do -- we can't do on-dock rail through NPBL either by virtue of the rate or by virtue of their lack of ability to get and willingness to obtain an operating plan from Norfolk Southern.

And that was also something that happened in 2010 but it happened again in 2015 and in 2018, as we saw from the Norfolk Southern document, you know, we don't want them coming in. That's been their position throughout, but they have done it in different ways over time.

THE COURT: Were you going to address the statute of limitations in talking about the state claim, the two-year statute of limitations and the damages issue that I raised?

MR. HATCH: I think, Your Honor, that -- I think Your Honor's question was if I don't find a breach of fiduciary duty by the Norfolk Southern board members in 2018 by virtue of the shareholder vote, is there no activity that's within the

statute. And I believe I would rely on the same set of overt acts that I've walked the Court through to say it is not just the breach of fiduciary duty. We also have other acts that harmed us in our business done both by Norfolk Southern and NPBL well within the statutory period. And that's that same set of both the 2015 moves, the trackage rights dispute, and then the failure to give honest, fair consideration to our service proposal.

Your Honor asked a question about the relevant market, and I would just say unless the Court has other questions, yes, the relevant market is a question for the jury in this case. Each side has sponsored an economic -- or at least we and Norfolk Southern have sponsored an economic expert, they have differing opinions about the contours of that relevant market, but that is certainly a jury question.

As we've quoted in our brief, the Supreme Court has said these antitrust cases are highly fact-intensive cases and they're not often susceptible to summary judgment. So I certainly view that as a trial issue.

I also think just briefly, certainly our complaint did put them on notice of what the market was. Our expert's definition is, if anything, narrower than what the complaint's is, but is well-encompassed within it. So I don't see it as necessary for us to amend our complaint. We gave them notice.

Our expert has also calculated damages based on Port

of Virginia, not just NIT, so there's really no need to amend the complaint. And I think there's no credible claim that they had a lack of notice or a prejudice. They had roughly a year, I think, between receiving our expert report and having to submit their open due to the COVID extensions and stay that was in the case at the time.

And with respect to injunctive relief, we certainly think that there should be a trial, Your Honor, and that the Court would take up injunctive relief after that trial. The STB proceeding on the trackage rights dispute are stayed, but again, those are only proceedings about what rate NPBL would pay to Norfolk Southern for the trackage rights, they're not directly going to determine what switching rate NPBL would resultantly charge, if that makes sense, to customers like CSX.

Court's indulgence?

(Plaintiff's counsel conferred.)

MR. HATCH: Unless the Court has further questions at this time, I'll cede to my co-counsel here.

THE COURT: Well, for those of us of my age, I think it's time to take a break. So we'll take about a five-minute break and come on back.

(Recess taken from 11:35 a.m. to 11:47 a.m.)

MR. LACY: Good morning, Your Honor. Again, Michael Lacy on behalf of defendant Norfolk Southern.

In speaking with Mr. Snow, Belt Line's counsel, we

thought it would be helpful if we addressed the statute of limitations damages issues questions raised by the Court. I'll do it on behalf of Norfolk Southern, and Mr. Snow will do it on behalf of the Belt Line. And then with the Court's permission, Ms. Ryan will address the antitrust questions that the Court has raised in terms of the market definition and perhaps on the injunctive relief, if that's okay with the Court.

THE COURT: Sure. That's fine.

MR. LACY: All right. Thank you.

You know, Your Honor, I think the Court's questions dovetailed nicely with the organization of our argument that we wanted to present to the Court. And I think we first need to start, as it relates to the statute of limitations, with the understanding of the damages model that CSX has put forward in this case, because I think it answers many of the Court's questions.

As the Court knows, the damages model is a annual year-by-year calculation of profits that CSX believes it would have been able to achieve but for their alleged inability to access NIT by rail.

That damages model, which our papers point out is their only evidence of damages in this case, is improper under the Supreme Court's decision in Klehr. I know the Court has intentioned Zenith, and so did Mr. Hatch, but the Court also mentioned Klehr, and Klehr is the case in which you have the

Supreme Court outlawing the bootstrapping that is plainly evident here in this case that's being attempted by CSX.

Under Klehr, Your Honor, which I would say was decided many years after Zenith and was decided after the Lower Lake Erie case on which CSX relies -- and I would actually point out that in Klehr the Court was actually rejecting the Third Circuit's rule that CSX seeks to impose here. And of course Lower Lake Erie was a Third Circuit case. So there's a lot of symmetry here with Klehr. But in Klehr, as Mr. Hatch said, it was a RICO case, the RICO claims, but they used antitrust statute of limitations law as an apt analogy.

And the primary issue in that case, as I said, was whether the Third Circuit correctly held that a plaintiff can recover damages caused by predicate acts that occurred outside the limitations period merely because the defendant allegedly committed an act, an overt act within the limitations period.

And of course the Supreme Court said, and I quote "That is not a proper interpretation of the law." That's at Page 188 of the Klehr case.

What the Supreme Court held this Klehr, which is directly applicable here, is that "the antitrust claim accrues and the statute of limitations begins to run when the defendant commits an act that injures plaintiff's business." It also held that "the commission of a separate new overt act generally does not the permit the plaintiff to recover for injury caused by old

overt acts committed outside the limitations period."

Again, that means that plaintiff cannot use a independent new predicate act as a bootstrap to recover damages purportedly caused by acts committed outside the limitations period.

Now, the next holding of Klehr is part and parcel with the holding in XY that the Court has mentioned several times. The plaintiff cannot only -- "A plaintiff cannot rely on a new overt act within the limitations period unless it can show how any new act could have caused them harm over and above the harm that the earlier acts caused."

THE COURT: Well what -- I heard this morning is, I think, in 2009 I was -- my client was excluded from the market by the rate. And in 2015 my client was excluded from the market physically. I suppose you can argue that the damages are overlapping, but under the construct requiring a new overt act -- an overt act within the statute and new accumulating damage, that's a very difficult question to answer. Is that what we're facing? That's what is being argued to me, that even though the client is -- you know, from 2009 the exclusion starts. And the thing that makes this case so very difficult is there's a lot of good evidence that shows that your client did it. And that's troubling.

On the other hand, the Court deals in the law, and the law of limitations has its purposes. And just looking at one

treatise, the Wolters Kluwer, you know, this is how they summarize it: "Limitation serves the same functions in antitrust as elsewhere in the law: To put old liabilities to rest, to relieve courts and parties from stale claims where the best evidence may no longer be available, and to create incentives for those who believe themselves wronged to investigate and bring their claims promptly, particularly when they are known or can be determined. Repose is certainly valuable in antitrust where tests of legality are often rather vague. Where many business practices can be simultaneously efficient and beneficial to consumers but also challengeable as antitrust violations, where liability doctrines change and expand, where damages are punitively trebled and where duplicate trebled damages for the same offense may be threatened. In addition, relevant evidence may disappear over time. Antitrust liability depends not only on the parties' acts, but also on many surrounding circumstance, including the behavior of rival firms and general market conditions, matters that may be hard to reconstruct long afterwards. Moreover, the old evidence that survives may be admitted even though incomplete."

Maybe that's something that I should have read to CSX.

But I think you, you know, you have to face head on and parse for me this very specific issue of whether or not the 2015 physical exclusion from the market that they have argued -- I know you oppose it, but if there's a genuine issue of material

fact on that, does that get them to a jury? And that is what I am struggling with.

And in connection with what I just read to you, I would ask you this: Where much of the evidence is old evidence outside the limitations period, bearing in mind what I just read to you, when you have a lot of that evidence being old evidence outside the limitations period, how does that affect the Court's reliance on limitation and construction of limitation. And in this case -- you know I'll just, this is -- this is how I drew it. You've got two lines: One from 2009 to right now. It's market rate exclusion. Then Mr. Hatch argues that, from 2015 overlapping that, you have physical exclusion; a new overt act, and he argues new accumulating harm. And I'm left to deal with what new accumulating harm means -- or new accumulating damages mean when you've already had exclusion and you've got an act that they say is new exclusion with new damages.

I think that's what I'm struggling with, as best I can articulate it. So I really need to hear from you on that, I think.

MR. LACY: And Your Honor, I welcome the opportunity to speak to that. First, obviously, we agree whole-heartedly with the legal principles that the Court read from that treatise. We think it applies 100 percent to this situation. And I would point out to the Court, and it's in the record before the Court, that as early as 2009 and 2010, CSX not only

contemplated bringing this very lawsuit to try to adjust access to NIT, it threatened both the Belt Line and NS, Norfolk Southern, at that time that it was going to do that. And that can be found at Exhibits 114 and 115 in our summary judgment papers. So you know, this was a well -- at least this claim was well known to CSX as early as 2010.

Now when you get to the 2015 moves, Mr. Hatch on the one hand said it was operational foreclosure, if you will. But did he not explain to the Court --

THE COURT: He says there's a genuine issue of material fact on that point at the very least.

MR. LACY: Absolutely. At the very least. And we'll circle back, and I know Mr. Snow has something to say about the 2015 moves, but what Mr. Hatch did not tell you is how the damages purportedly caused by this operational foreclosure are any different from the damages purportedly caused by the setting of the rate in 2009.

And if you look at their damages model -- and again, Mr. Hatch conceded this -- it makes no effort to distinguish what damages were caused by either act, assuming either act is an overt act.

THE COURT: What's he say about that? What is his response as you understood it on the damages issue?

MR. LACY: As long as there is an overt act in the limitations period he can recover whatever damages were caused

in the limitations period.

THE COURT: Well, didn't he say, look, we claim this whole body of exclusion, and the physical exclusion damages are just a component of that, as opposed to -- think about it like two circles. Here is your circle of exclusion damages from 2009 to 2018. So is -- are -- the 2015 physical exclusion damages a subpart of that circle or a completely separate circle? Is that the question? Is that the way we should be thinking about this? Because there's two issues. Legally is that the way we should be thinking about it, and then how have they constructed their case such that the Court should or should not hold them to what they have said and done and what they have divulged in their expert report?

MR. LACY: Your Honor, let's look at it legally first.

Under Klehr and under Zenith, you cannot recover damages suffered in the limitations period caused by conduct outside the limitations period, okay? That is absolute law. I don't think -- I don't think even CSX disagrees with that.

So then let's go to 2015, the damages model. As Mr. Hatch conceded, CSX has made no effort to try to distinguish what damages were caused by conduct occurring outside the limitations period -- the setting of the rate, for example, or the purported rejection of the 2010 rate proposal -- as opposed to damages caused by this, what I would call operational issues with respect to the 2015 moves. The damages model calculates

the same lost profits annually.

THE COURT: What's your best case -- I'm sorry you're getting the brunt of some of my thinking here on these questions. But what is your best case that supports that proposition that it has to be separately divulged in discovery that your expert has to identify it separately?

MR. LACY: Multiple cases, Your Honor. We've got the XY case, we've got the Klehr case. We've got the Gumwood case, which is directly on point and was not distinguished by CSX.

And they dovetail even the cases that hold that when you have conduct that's determined to be not illegal but you fail to distinguish between damages caused by that conduct versus conduct that may be illegal, that renders the damages model inadmissible as well. That's the Comcast decision from the United States Supreme Court. I mean, this is a well-established body of law. This bootstrapping idea is well-established.

And Mr. Hatch doubles down on what the expert said. The expert didn't say the damages -- let's take a year, for example. Let's take 2016. The damages model does not say in 2016 we lost these contracts, the profits from these contracts because of this act. When you look at the number, the damages figure for 2016 in their damages model, you have no idea whether it's caused by the setting of the rate, this purported operational blockage or some other reason. And that is by

design. Their expert says, oh, I didn't differentiate between the acts, I based it on the totality of the conduct.

THE COURT: How does that harm you?

MR. LACY: What's that?

THE COURT: How does that harm, hamper you in your trial conduct? In your preparation for trial. How does that failure on their part hamper you?

MR. LACY: As all of these courts say, it leaves the jury to speculate as to what damages are properly recoverable. Because we know as a matter of law, damages caused by conduct occurring outside the limitations period is not recoverable. That's the bootstrapping. That's Klehr and that's XY. And when you don't break it down, that renders the entire model inadmissible. They have offered no evidence.

And in fact, Mr. Hatch today conceded that it was not just the rate that caused these lost profit damages, which is clearly not recoverable, but it was these other things. But the jury has no evidence in the record, there is no evidence in the record for the jury to determine that. That's why these cases that we've cited to the Court exclude these damages models.

THE COURT: So if the Court did nothing but strike their damages expert, what happens?

MR. LACY: Well, they have no evidence of damages, and so then there is -- they have no standing to bring their claims.

And this bleeds over into the injunction issue. But

again, it becomes an Article III standing problem. If you have no evidence of damages, you cannot make out a claim. Damages is a *prima facie* element of each of their claims, both antitrust and state law.

I'd also say to Your Honor that the cases we cite -- now we do have a *Daubert* motion pending that makes many of the same arguments, and that's to be heard tomorrow, but the cases that we cite, the Court grants summary judgment on these claims for this very reason, because the damages model is legally improper under well-established case law.

And the statute of limitations comes into play in a second way too. And that is, as the Court has pointed out and asked Mr. Hatch multiple times, what is the new and accumulating injury caused by these 2015 operational issues? And again, the same damages they claim in 2015 forward are the same damages they're claiming prior to 2015. They make no effort to distinguish.

THE COURT: What about CMA?

MR. LACY: Pardon?

THE COURT: What about CMA?

MR. LACY: Your Honor, the damages model does not identify the CMA contract. It doesn't do that. It says that because we couldn't access NIT --

THE COURT: So there's two levels of problems here, right? So one is what have they identified as damages and how

have they identified it, have they segregated it, and the other is, at a higher level, is it a new accumulating -- is there something new and accumulating?

MR. LACY: That's right.

THE COURT: Arguably had they broken it down we would just be arguing about the first, the high-level issue?

MR. LACY: True. And then it would be about causation, right? Did the operational -- well, it would be is there -- is this evidence of a conspiracy, an overt act, and did it cause them, in fact, to lose a particular contract? But we don't have that. We don't even get out of the gate because they make no effort to segregate their damages. And there are case after case --

THE COURT: Why didn't they? Why do you think they didn't?

MR. LACY: Your Honor, I must admit, the Norfolk Southern trial team and I don't want to speak for the Belt Line, we had no idea why they came up with a damages model that starts in 2009 and does not segregate out the harm. Case law has been around for years. The bootstrapping is a well-established principle of law. It also shows, Your Honor, and the Court is aware of this, that if the damage accrued in 2009, all of their claims accrued in 2009, right? All their claims are time-barred on their face based on their damages model.

And to get to some of the Court's other questions,

they must rely on the continuing violation exception. Now, we cited the XY case in our papers saying it's their burden, and they have cited no case -- their burden to prove the continuing violation exception.

It is our burden to show that they're time-barred. And that was easy for us, because we looked at their damages model and it said oh, yeah, we've started losing profits in 2009. Okay. That's when your claims accrued. So why aren't they time-barred? And it's their burden to show the continuing exception principle applies, and they cannot do it. And the main reason they cannot do it, it goes back to the back damages model, is because they have not shown what new and accumulating injury was caused by any conduct within the limitations period. It's more of the same.

You know we cite, Judge, another case from the Fifth Circuit talking about the abatable but unabated natural consequences of earlier acts. And I think the Court said something it that effect earlier. That is exactly what we have going on here.

And this isn't a situation, Your Honor -- you know, this isn't a, what they call the Zenith Exception where they didn't know what their damages were in 2009. I mean they, they have an expert that has calculated their damages. That is not -- they weren't beyond calculation. I don't know why they did it how they did, but they are stuck with their damages

model.

We asked in interrogatory, tell us your damages. Tell us how they're calculated. They referred us to their expert. We have the expert damages model. It is fatal to their claims. The damages model is legally improper. And the Court picked up on that time and time again with its statements. And the case law backs that up. It's as simple as that, Your Honor.

Now even if you put aside the problems with the damages model and look at the overt acts, purported overt acts within the limitations period, again, under the continuing violation theory they have to show the overt act that causes the new and accumulating harm. And I know the Court is very focused on the 2015 rail moves, and of course we disagree whole-heartedly with their characterization of how those rail moves came to being. We don't think there is any genuine issue of material fact that there is not a single train that CSX asked the Belt Line to move that the Belt Line didn't move. And I know, I know --

THE COURT: But the evidence about 21 days, you're saying that's not a genuine issue, that didn't create a genuine issue of material fact?

MR. LACY: What I would point the Court to is exactly what Mr. Hatch said after conferring with Mr. McFarland: NIT was a mess in 2015. A mess. This is not a two-party or even a three-party operation here. It's not just CSX, Norfolk Southern

and the Belt Line. You've got the port. The meltdown was at the port. That's why even under their own pleadings they said the port was so congested we had no choice but to use the Belt Line. Well, that's not true. I mean, the port congestion is true. They always have a choice to use the Belt Line, but you can't ignore the congestion at the port to suggest, you know, it's our fault, solely our fault, that -- or our fault at all -- that their trains sat there for 21 days.

And I think a close reading of the deposition testimony that we cite shows, even from Mr. MacDonald, I think he uses the phrase "it was melting down." The port was melting down.

So again, even -- but you don't have to necessarily decide that fact because they have not shown what damages, new and accumulating damages, damages over and above the damages that were caused -- the same lost profit damages that were caused by the setting of the rate, or the rejection -- or the purported rejection of the 2008 rate proposal, all of that time-barred conduct for which they can claim no damage.

I'd also point out -- and I know Mr. Snow will have something to say about this -- their issue with the 2015 train moves appears to be just with Norfolk Southern. Now, they claim that Mr. Moss emailed Mr. Luebbers about their train movements as if that was some state secret. Your Honor, they're moving the trains on our track. It was not a state secret that they

were -- the Belt Line was operating on our track.

I'd also say with respect to the proprietary issues -- and I think the Court picked up on this -- it is a single track. It is a very difficult move because the Belt Line can only go in counter clockwise and then has to come back out. It can't make the loop. Which is why, Your Honor, when they sent in their 2018 rate proposal --

THE COURT: Why is that? Why did the original agreement not include the trackage rights for NPBL? Was that portion constructed later? Was it not there? Was it -- do you know? I'm just curious.

MR. LACY: I don't know, Your Honor, so I don't want to speculate, but I do want to get back to the trackage rights agreement, but let me finish this thought first.

Your Honor, this is not -- as I said, this is not an easy move. There are obviously many operational issues that have to be dealt with, which is why, with respect to each of their rate proposals -- neither of which were rejected by the Belt Line Board because there was no vote on either -- but both proposals included operations plans, right? There are proposed operations plans. And in response to the 2010 proposal, we actually gave them an operations plan. And it is not coincidental that the operating window we gave them in response to their 2010 proposal is the very operational window they used in 2015. I mean, it's just -- you know, again --

THE COURT: Didn't add up to 50 percent, did it?

MR. LACY: What's that?

THE COURT: It didn't add up to 50 percent though.

MR. LACY: No. But the only way it gets to 50 percent is if CSX uses the Belt Line, otherwise the Belt Line has no reason to use our track. We can't be hoisted on our own petard because they don't use the Belt Line. That doesn't work.

So Your Honor, the other thing I wanted to make clear because Mr. Hatch mentioned it and it's in their brief, they know they have a damages model problem caused by or created by statute of limitations, which is why they pivoted in their brief and said, well, we paid this exorbitant rate in 2015 and that's good enough.

A couple things: We now know that the rate is based on the Belt Line's costs and is not exorbitant or excessive. But putting that aside, that's not what their model reflects. This is not a situation where you have a customer buying a product at a supercompetitive price because of a monopoly. Their damages model is based on a rival being shut out of a market. Foreclosure, lost profit damage. Their model does not seek to recover the $2,000 or whatever it is they paid to the Belt Line to move those trains in 2015. They cannot switch their damages theory to avoid the statute of limitations. This is way too late in the ball game, way too late in the ball game. That is not the theory they presented to us throughout this

case. It is not the theory that their expert opines on. Their expert seeks or opines on lost profits damages, not prices paid.

THE COURT: All right. I think I've -- go on.

MR. LACY: I did want to briefly address the 2018 proposals, and I think the Court's comments aptly summed up the legal scenario there.

The Belt Line Board was not asked and did not vote on the rate proposal in 2018. That is admitted. Mr. Hatch conceded that.

THE COURT: Mr. Hatch said it was an overt act just with the shareholder vote and it was an overt act when they asked for it to be sent to the rate committee. Didn't he say that?

MR. LACY: Your Honor, they didn't want a rate committee. The evidence in the record shows two things: One, the first sentence of their rate proposal says we want the Belt Line management to approve or agree to this rate proposal. Now, it goes on to say if you want to have a rate committee we're okay with that. You can -- the proposal says that.

Now, what CSX ended up saying is we wanted a rate committee of neutral individuals, just like they said they wanted the Board of the Belt Line to be reconstituted, contrary to the supplemental agreement that they agreed to, that CSX agreed to in 1987. And we have no obligation, under law or otherwise, not to be able to rely on that agreement that the

parties followed for 30 years. There is -- that is not an overt act.

THE COURT: Why is the distinction between -- in evaluating whether or not an overt act took place in 2018, why is it significant in the analysis to distinguish between the shareholder vote by the shareholders versus absence of a motion before the Board?

MR. LACY: So of course with respect to the absence of a motion or a vote shows that there's no overt act, period. Okay? But the distinction between Norfolk Southern acting as a shareholder --

THE COURT: No vote by the Board, you mean?

MR. LACY: Yes, by the Board.

THE COURT: So why wasn't the vote taken by the shareholder's overt action?

MR. LACY: Because Norfolk Southern as the shareholder had the absolute legal right to vote down the corporate governance proposal that sought to reconstitute the board of the Belt Line in a manner that was wholly inconsistent with the supplemental agreement that amended the operating agreement to which CSX specifically agreed to and to which the parties had operated under for over 30 years.

It is -- they cite no case law whatsoever that suggests that it is incumbent upon any shareholder to act inconsistently with the governing documents.

THE COURT: Okay. Got it.

MR. LACY: Your Honor, give me a moment. I did want to consult my -- I was feverishly --

THE COURT: Do you have any cases on that? What's your best case on that point?

MR. LACY: Yes, it is -- I would suggest it's the -- I think it's the Ames case we cited which is really just the prospect that it is not illegal or improper to enforce a contractual right. It's as simple as that.

THE COURT: In the monopoly context?

MR. LACY: In the monopoly context or otherwise. Again, I would put it or say the inverse: CSX has offered the Court no case that suggests that contractual rights -- or corporate governance needs to be disregarded in this context.

I would also say Your Honor it smacks of estoppel. I mean, they agreed to the Board composition.

Your Honor, you also asked about what damages -- with respect to the state law claims, what damages would be attributable to any breach of contract. Again, they have this single unitary damages theory that is their damages calculations for every single one of their claims. And the same anti-bootstrapping principle applies equally with respect to their state law claims: Just as if -- or just as a plaintiff can't come into this court seeking damages for and out-of-limitations-period breach of contract, they cannot seek

damages for out-of-limitations-period damages.

THE COURT: Do I have the discretion to allow them at this point in the litigation to amend their expert report in order to segregate?

MR. LACY: No. I would submit to the Court absolutely not. Your Honor, this case has been pending for three years.

THE COURT: I asked you whether I had the discretion, not whether I should.

MR. LACY: Yeah, I understand. Your Honor, discovery has closed. I, I, I can't say that I'm aware of any rule or case that explicitly says that that would grant the Court the discretion to do so. But of course our position is it should not, CSX should not be given an opportunity. This case has been pending for over three years. These limitations issues, Your Honor, have been front and center in this case since the moment it was filed. We raised it on the motion to dismiss. The Belt Line raised it on the motion to dismiss.

THE COURT: When was your settlement conference? When was your last settlement conference in this case?

MR. LACY: The spring of 2021. The spring of 2021.

THE COURT: Any ongoing discussions?

MR. LACY: Your Honor, I can represent to the Court that I believe the parties have made very extensive efforts to try to settle, but unfortunately at the moment we're at an impasse.

THE COURT: And you don't think I should allow them to amend their expert report?

MR. LACY: Oh, no. No, Your Honor. We've set up our entire case around this expert report.

THE COURT: But more than that, you say even if I were to allow them to do it and there was a segregation of damages based on exclusion in, for example, 2015, that it doesn't satisfy the case law standard because it overlaps with the exclusion by rates?

MR. LACY: That is absolutely right, Your Honor. The statute of limitations is fatal to CSX's claim in two ways: The damages model is foreclosed by the law, and they have not and cannot meet their burden of proof of showing an overt act within the limitations period that causes damage above and beyond the damage caused outside of the limitations period. Or the damages caused by conduct taken outside the limitations period.

THE COURT: Okay. Have you addressed all of those issues that were in your bailiwick?

MR. LACY: I have. Unless the Court has questions.

THE COURT: No. I think I've asked you everything that I have.

MR. LACY: All right. Thank you, Your Honor.

THE COURT: Thank you, Mr. Lacy.

Mr. Snow?

MR. SNOW: May it please the Court, Your Honor. Ryan

Snow on behalf of Norfolk & Portsmouth Belt Line Railroad Company. I should first say it's a pleasure to be here in person.

THE COURT: Not a lot of in-person hearings these days, are there?

MR. SNOW: There aren't, Your Honor. There really aren't.

If you'll indulge me, I'll put a fine point on a couple of things and hopefully answer Your Honor's questions in the process, but I don't intend to reiterate everything in our brief.

Those things are, One, they can't show concerted action for their conspiracy, which touches on a number of the questions you asked.

Two, they can't show harm from any act within the statute of limitations. And I won't repeat what you all have said, but I may add some thoughts to that.

And actually three, I think it's a very important point in the discussion here: They can't challenge the Belt Line's rate because they don't dispute our operating costs. And I'll explain that.

But if the Court will, and I'll start with an observation, and that is that the scenario that the Court learned about in the complaint is very different from the reality that has been borne out in discovery. And I will show

Your Honor just a few examples so you'll understand what I mean, because they lead directly to CSX's failures in its ability to establish its claims here.

And I wonder if the court could put our laptop on the screen and make sure that works?

Your Honor, is our screen showing on your screen?

THE COURT: I see it.

MR. SNOW: Very good. I'll refer the Court to the complaint, Paragraph 40, because this relates directly to a lot of Mr. Hatch's comments. It related to the, what I will eventually call a house of cards that they built on this conspiracy.

In Paragraph 40 the complaint alleged two things. One is that when the Belt Line received the 2018 rate proposal from CSX, it didn't even consider it, much less respond substantively to it.

And then they further say the individual defendants, one of those was our president, Cannon Moss, refused to even form an independent committee to evaluate it or allow a formal vote and thus effectively rejected it. I'll refer the Court to an email from Mr. Moss dated April 5th, 2018. This is days after CSX sent the Belt Line the 2018 proposal. Days after. And it's sent to Tony DiDeo at CSX, the very person who sent us the proposal. Keep in mind, CSX --

THE COURT: Anything you're referencing is in the

papers, I take it?

MR. SNOW: Yes.

THE COURT: As exhibits?

MR. SNOW: This is all within the evidence, yes, Your Honor.

THE COURT: That's before the Court?

MR. SNOW: I believe so. Although I don't have the exhibit reference. I know you'll ask me.

But the point is, in the response he says "Tony, thank you for taking time to talk with me." So he's talked with him. He's met with VIT. He says "The operating plan outlined in the 2010 letter gives us a good starting point for the operation."

He says "If we formulated a similar plan, two crews would be required. Interchange would be at Berkeley Yard. Starting maximum length of the train would be 4,000 feet. We'd require two locomotives. Belt Line would need to hire nine additional employees." And at the bottom, "Belt Line Management has reviewed the proposed rate and would recommend to the Board for a rate committee to do a complete review of the tariff," which is exactly what CSX was asking.

This is exactly the opposite of what they told the Court in the complaint that we did not respond to that proposal.

And I'll show Your Honor, Mr. Moss did exactly what he said. This is their admission. 17. "Admit that at the NPBL Board of Directors meeting on April 18, 2018, NPBL president

Cannon Moss" -- one of the individuals that they said never pursued the rate committee -- "recommended the appointment of a rate committee. Admitted."

And of course Your Honor, it's undisputed that they did not move for appointment of that committee.

So Cannon Moss, the Belt Line that they say is conspiring against them, actually moved for the thing they wanted and their people did not.

They also didn't move to accept that rate proposal. That is undisputed.

And it's undisputed, I think, that there was no actual rejection of the rate proposal dispute, what they said in the complaint.

Now, they had also said there was a conspiracy because all of our presidents came from NS. Mr. Hatch repeated that today. I would show Your Honor, we asked them admissions on this too going back to 1990. "Admit that Dennis Walker" -- he is the oldest one in the story -- "was unanimously elected from 1990 through 2005 and each year gets unanimously elected. Response, Admitted."

The next president was David Gooden. "Admit that he was unanimously elected in 2005 and again, 2006, 2007 and 2008. Admitted."

And now we're right into the time period that we've all been talking about.

"Admit that the Board of Directors unanimously elected David Stinson as president in 2008. Again, 2009, '10 and '11." It's admitted.

CSX's Board of Directors members appointed these presidents.

And then there's one more, because Cannon Moss is a central character in the story CSX tells. We took the admissions all the way to the year before they filed their complaint. "Admit that from 2012 through 2017" every year, "the Board of Directors unanimously elected Cannon Moss as president." That is admitted.

And there's a carve-out to say that they abstained in 2011, not really requested, but they added that.

The point being, even though they cited that to the Court as conspiratorial, turns out for 27 years straight, with the exception of one abstention, they voted for these presidents. They put them in as president.

They had said that it was a conspiracy to use Norfolk Southern locomotives, to lease those or to have email addresses with nscorp.com at the end of them, but what they didn't tell the Court in the complaint is that there's a service agreement for that. The Belt Line pays a fee for that.

And not only that, the service agreement was no secret because CSX was a party to it. The two shareholders agreed that for efficiency the Belt Line could do that. And to make sure

there's no doubt that they knew about it, that's their signature on the agreement. And yet those were alleged as conspiratorial acts by the Belt Line.

And of course finally they had said that there was a new agreement in 2018 to raise the trackage rates fee. That figured prominently in your decision on the motion to dismiss, Your Honor. We know, because of the request for admission that we put in our briefing, that never happened. That event just never happened.

And if I can, I will add one other thing, because there was discussion about the trackage rights fee in Mr. Hatch's argument. And there was an exhibit given to you, it was Page 6 of CSX's submission, if you have that in front of Your Honor.

This came up in the discussion of apparently a new overt act, which is that the Belt Line and NS, in CSX's view, pretextually created a dispute about the trackage rights and the timing is a coincidence because it was -- or may be not a coincidence -- because the timing was purposeful according to CSX because it happened to coincide with right when they felt like they were being pushed out of NIT. And what was said was, at the STB, NS wants seventy dollars for a trackage rights fee per car. That's correct; the Belt Line wants 30, that's correct; but that under the 1917 agreement based on this exhibit, it was just eight dollars a car. So we're both way

over that. Well, this is cut off, this testimony.

If you look at the full testimony, the eight dollars is just a wheelage fee under this agreement. The full testimony from Mr. Moss is with the 1917 agreement, we were basically paying eight dollars a car, but we had fixed costs built into that agreement among some other joint facilities agreements which are about a hundred thousand dollars worth of fixed costs that would then get spread across all the cars that we ran up there. And it'll come out in the STB, but when you add up those hundreds of thousands of dollars, it ends up about thirty dollars a car.

So again, I relate these things to the Court because they indicate what has been said versus what is real. And it leads directly to our complaint, my finer point, Your Honor, that they cannot show concerted action by the Belt Line.

And I will -- it's important, I think, to understand that for the state court -- there are only conspiracy claims against us, the Court knows that. There are four: Two state law and two federal law -- I mean two state law and two federal law.

On the state conspiracy claim, they must show that by clear and convincing evidence. They must educe some facts that show by clear and convincing evidence there is a conspiracy.

And on the antitrust counts there's a different burden, it's preponderance, but there's an additional showing.

"The plaintiff" -- this is from the Monsanto case -- "must bring forward evidence that excludes the possibility that the alleged co-conspirators acted either independently or based upon a legitimate business purpose." That is their burden to bring forward. The Laurel Sand case says it's their burden as well in the Fourth Circuit. But they have to show that this conduct cannot have been independent or with a legitimate business purpose.

And we asked for all the evidence here. Your Honor has asked about our interrogatories. If I get into a case where we're accused of conspiring, I want to know how. And so we asked them, all communications, all overt acts, tell us what those are. And they didn't give it to us, frankly. Judge Leonard, on a motion to compel, had to order them to give it to us. And finally they gave us a narrative and they identified the six things that we put in our brief. And I respectfully submit that those are the only six things that can be overt acts, because they never supplemented that interrogatory answer, and you can't supplement it in response to a motion for summary judgment. Discovery is closed.

The responses they gave us show that their case hinges on what I call a false legal theory, which is two NS people talking to each other equals Belt Line conspiracy as long as one of them happened to be one of our board members or a rate committee member. And I didn't even hear Mr. Hatch talk about

that today, I don't know if they concede the point, but they should, because the Virginia Supreme Court has said at least twice that that's wrong, most recently in the Monacan Hills case when it said "Directors of a corporation have authority to bind it only when they act collectively as a board. Individual directors are not its agents, and it's well-settled, therefore, that declarations and admissions of individual directors, when not acting as a board, are not binding on the corporation" -- not binding on the Belt Line" -- nor admissible as evidence against it, unless they were acting at the time as its authorized agents within their scope of their authority."

We cited that case. They put forward no evidence that there has been any grant of authority to anyone to go conspire on our behalf. And frankly there's a good reason for that Rule. Because we don't control their board members. We don't know what they're doing when they're not in our board room.

Strip those away, and I think you're only left with the 2015 moves that Your Honor asked about. And I respectfully submit that there's not even a genuine issue of fact about whether the Belt Line was conspiring against CSX with those moves. There's really not an allegation. Mr. Lacy pointed it out: This claim had never been made against us really until the summary judgment briefing. Their expert in his report says this is all an NS thing. NS blocking us. Because it's true. The Belt Line tried to move mountains to make these things happen.

And if you look at the undisputed facts, the facts that are before the Court now, the undisputed facts about the 2015 moves are that Cannon Moss, the Belt Line -- and I refer to Page 10 of our opening brief with our statement of undisputed facts, that we were requested on March 27th, 2015 to move trains for CSX. By March 31st, days later, we had come up with an operating plan, and then on April 1st we moved that train. That, in I think any objective view, is an incredibly quick turnaround on a request that even CSX admits had never been made before except for one demo train for PR purposes in 2010.

And I know they pointed to an email from NS's vice-president where he says until I know more about this, no, exclamation point. But that's not our email. And frankly I don't blame him for wanting to know more, because it hadn't been done before.

And the Court is right to point out logistical issues with this. I think this is why it took a few days for that first move, because our trackage rights are only through the north end and the port goes clockwise. South end inside, out north end. So what was being proposed --

THE COURT: Do you know the answer to the question I asked earlier about why you don't have trackage rights on the south end?

MR. SNOW: The only trackage rights we've ever been given were to the north end. So I don't know why in the

historical context we don't have those. Maybe because we had the north ones. But that's all we've got.

THE COURT: Okay.

MR. SNOW: And so what we were dealing with was a counterclockwise move that had not been done before except for one PR instance, and we had to coordinate with not only NS because we go up their tracks, but also have VIT because we're going in NIT. And again, that was all done in this span of four days. Four days we turned that around. And in total we moved -- there's a dispute about the number of trains, but it's not material -- we moved multiple trains for CSX.

The only thing they pointed to with their 21 days that stood out to me because Your Honor asked about it, that's not an allegation against the Belt Line. Their train was up at NIT. But there's no allegation that it was our fault. There's really no allegation against the Belt Line at all except that Cannon Moss sent an email to someone at NS named Chris Luebbers who, it appears out of frustration, but did that harm anybody? How many people at NS already knew CSX wanted to make the move? That was no secret at all. And I don't know how you get over a clear and convincing hurdle or you get over a legitimate business purpose hurdle for the time it took to make these moves.

I should say the one other email they pointed to was where he said there were proprietary issues, but Your Honor saw the text, I think. He was forwarding that information

appropriate information from NS. Again, their beef in 2015 is with NS, it's not a conspiratorial act.

And so the only other things that have been alleged are 2018, the rate, what the Belt Line did with the rate proposal. But as I showed Your Honor in the intro, the only person who actually sought a rate committee to evaluate that rate proposal was the Belt Line. CSX didn't even do it. It was the Belt Line. And I don't know how many times we can do those things and it's all assumed to be pretext. But that was the only other thing they have mentioned.

And of course the 2018 increase in the trackage rights fee we know didn't happen at all.

I should mention one thing about the new act of apparently going to the STB on pretext because we had a dispute about the trackage rights agreement, that was a 99-year agreement. It ended, and it happened to end in 2016. When they say the timing of that indicates foul play or conspiratorial conduct, the conspiratorial conduct would have to go back 99 years, because that's what the agreement said, it was 99 years long. NS didn't renew it. We're at the STB, and I honestly don't know how we can be faulted for going to the one venue that has jurisdiction over this that we can't control. They're going to do what they believe is the right thing.

But that was not identified in the interrogatory answers. They don't identify any new harm associated with that.

Not any more than they identify new harm associated with the 2015 blockage. And so they're missing, Your Honor, an essential element of all of their claims against us, which is concerted action.

I think your discussion with Mr. Lacy covered the waterfront on the statute of limitations and the damages. If I may, though, I will point out just a couple of things about that.

There is no dispute here that the damages model CSX has constructed includes acts from outside the limitations and acts from inside the limitations period. There's no dispute about that. And I would point the Court to Page 49 of their opposition brief where they say, and I'll quote -- and they're talking about the acts within their damage claim "Most of these occurred in years after 2013 within the limitations period."

Well, to me that makes the problem obvious. The conflict with Klehr obvious. Is it 90 percent were within the statute of limitations period? Is it five percent? 28.3 percent? Nobody knows. I don't know, you don't know, the jury won't know. And so the jury is left only to speculate, and it's a problem of their own making. It's a problem of their own making.

I will, if I may I, in addition, point Your Honor to one part of the Klehr case that I think is significant to this case, and that's on Page 190. And I pulled it up on the screen,

if Your Honor has that still available. But this comes right after the Supreme Court has said the plaintiff cannot use an independent new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period.

The court goes on in the section I've presented to Your Honor, "Thus, Klehr may point to new predicate acts that took place after August 1989." Just like here. CSX may point to new predicate acts. "But that fact does not help them, for as the Court of Appeals pointed out, they have not shown how any new act would have caused them harm over and above the harm that the earlier acts caused."

This, to me, is an explicit rejection of the damages model that CSX has presented in this case because they have not shown any harm, "over and above" the harm they identified originally, and their expert doesn't even try to.

THE COURT: So Mr. Hatch posited that's an intellectually unsatisfying proposition in the antitrust context; that it can't be -- if I understood his argument correctly -- that someone can just go on and on and on engaging in antitrust violations and there being no remedy. I think that's what I heard. How do you interpret that?

MR. SNOW: Certainly, Your Honor. I think there would be a remedy. If you can identify -- you can't just identify an overt act. The case law is clear, the overt act must also cause

some injury that's over and above your other injury within the statute of limitations. But if you could do that then you would have a claim. They can't do that here. They haven't done it. And it's the model they have created. So...

THE COURT: But if the damage being alleged is an exclusion from the market and it goes on for 20 years, they're just, they're out of luck if they don't do something in the first four years, you're saying?

MR. SNOW: I don't think they're out of luck if they can identify some new overt act. But if, if -- the case law is pretty clear on that point, that if -- for example, in our case, if CSX had identified their exclusion from NIT in 2009, which we show they did, yes, they did have to sue within four years, unless they could show later on an overt act that -- not just an overt act, but it has to be an overt act in furtherance of the conspiracy -- that leads to new damages over and above the ones they were already suffering.

THE COURT: What would that be? Give me an example.

MR. SNOW: Well, for example, if they had indicated any kind of damages from this 2015 move that was different from the exclusion that they already felt. And there are no damages that they've identified. There's no new story here.

THE COURT: Well, I don't think Mr. Lacy would agree with you on that, but we'll find out. I think he would say you can't identify any new damages because they're overlapping.

MR. SNOW: That's true. That's true. And I agree with that point.

THE COURT: Okay. I was asking you about could be -- it's not a fair question.

MR. SNOW: Yeah, might have misunderstood Your Honor.

The point would be that the new damages have to be over and above the damages that already exist, and that's just not what was done here. And again, I didn't build the model, I understand the Court's predicament and the like, but they built the model. They chose to do this. And I think frankly it gave them a really big number. Gave them a really big number. But it doesn't stand up under the case law. I don't think it gets to the Belt Line in any event, because they can't show the concerted action. But I wanted to offer this piece of the Klehr case because I think it assists the Court.

The state law claims, I think, are much easier. Those survive because of that 2018 increase in the trackage rates. We know that didn't happen now. Under Virginia state law, the overt act that triggers the statute of limitations is the first overt act. They cited the Blackwelder case that changes that, but it was a unique case on its fact because the conspiracy could only harm you after it was completed. It was a sale of land. The sale had to be completed. But the general rule under the Detrick case, that's Fourth Circuit 108 F.3d 529 that we cite, as it runs from the first act, and we know, just like the

Court recited on the motions to dismiss, that but for that 2018 new act, there is no new damage from anything to bring the state law claims back to life.

The final point I will make, Your Honor, is this point about our rate. No one else has talked about it. But our operating costs are what they are. There is no dispute about our operating costs. CSX doesn't dispute it. Their expert doesn't dispute it. He took the costs for what they are. And for their restraint of trade claim, for their overt act claim and for their state law conspiracy claims, this justification, on the federal ones it's a pro-competitive justification. It overcomes all of those claims.

On the state law, it prevents us from having committed any unlawful act because it's a reasonable rate. And so that's why I point it out, because it's dispositive of all their claims, and they don't dispute our costs. And when you look at our costs over the years, we put in our brief it's about $220 a car. Well, our rate is $210 a car. And the Laurel Sand case helps on this point, says the rate set at cost are reasonable. That is our rate.

The only way they seem to try to even avoid it is by saying that, Judge, you should look at incremental costs of just this one move. But there's no case law that supports that, that we can see. And I don't think they have provided you any. And of course what that would do, if incremental costs were the

answer, it means that we would have to ignore overhead, ignore capital improvements, ignore track maintenance, all these costs that go into our operations, we'd ignore them for CSX for this move and lower our rate. And the result, of course, would be that parties that are not before Your Honor, our other customers, they would bear the brunt of our overhead costs because we're giving CSX a special rate. That, I think, does not stand up under the law.

THE COURT: Who are your other customers?

MR. SNOW: Customers like Purdue Grain, for example, a substantial customer, would be essentially subsidizing CSX's moves, its intermodal moves up to NIT.

I feel like I should clarify, because you asked who are our other customers. A customer like Purdue Grain pays our rate, they actually pay it to Norfolk Southern or CSX. Our line haul switching rate is built into that fee. So all of those customers that pay our line haul switching rate that's built into that fee, they would be covering our overhead, which is what our line haul switching rate is designed to do. CSX would not.

THE COURT: But who is using your line? Who are the people using your line? The entities that use the NPBL tracks?

MR. SNOW: It's a series of customers along the rivers.

THE COURT: No, I mean the rail lines. The railroads.

MR. SNOW: The railroads that use us are CSX and Norfolk Southern.

THE COURT: Just those?

MR. SNOW: There's occasionally a Buckingham Branch Line. But I mean, if we're talking about the vast bulk of it, it's those two railroads. And so what would happen is our operations, the operations we conduct now, would subsidize this new intermodal move up to NIT if we had to give a rate that was different, lower, than the rate for all our other operations. And that's why our operations costs being undisputed are so important, because there's no case law that supports looking at something else that I'm aware of. And if that's undisputed, we have a pro-competitive justification that undermines the antitrust claim against you, regardless of the statute of limitations, regardless of the concerted action. And we also have a justification that prevents the state law conspiracy claims.

I hope I explained that correctly. Or in a way that answered your questions.

You asked a few questions, and you may have all the answers, Your Honor, and just tell me to move on, Mr. Snow, if you do, but you asked who has the burden of proof on this statute of limitations. I submit that the answer is CSX, because they must prove damages within the statutory window, statute of limitations of window. And that's really the issue

that we're pining out. They're missing that element of their claim. It's their burden to prove it and to show it to Your Honor.

You asked about the Belt Line's participation in 2015. I think I have discussed that, Your Honor. I think there really is no claim against the Belt Line in 2015.

You asked about fiduciary duty claims to support the state law claims if the 2018 act is out. I think statute of limitations is going to bar that. That statute of limitations is two years. So if the 2018 acts are out, there will be no state law claims.

And then you asked about the definition of the relevant market, and I will defer to Ms. Reinhart on that.

There was a question about injunctive relief. I don't think injunctive relief is available if they don't have that damages element of their claim. I think they haven't satisfied all the elements of the claim, and so I would submit that if you're missing that element you don't get some other form of relief.

If I have left anything out, Your Honor, please let me know. I want to make sure I can answer all your questions. Otherwise, that's all I have.

THE COURT: All right. Thank you, Mr. Snow.

It's one o'clock, Counsel, and we're not near the end, and so we're going to take a break. Why don't we come back here

at 1:40. It's one o'clock now. We'll come back at 1:40 and I'll hear more from you all. Thank you.

(Recess taken from 1:00 p.m. to 1:48 p.m.)

THE COURT: Okay. Who is next?

MS. REINHART: Good afternoon, Your Honor. May it please the Court, I'm Tara Reinhart for Norfolk Southern.

THE COURT: Good to have you.

MS. REINHART: It's a blessing and a curse to be going at this stage of the hearing Your Honor. I've heard so much. But there needs to be clarity brought to everything from start to finish, in my view, because this is about antitrust allegations and foreclosure.

THE COURT: Is that your specialty?

MS. REINHART: It is, Your Honor. I am an antitrust lawyer. I have been for more than two decades.

THE COURT: Okay.

MS. REINHART: Okay. So I'm going to answer all three of your final questions.

Your first question was why isn't the definition of relevant market a question for the jury given the disputed facts. And Your Honor helpfully provided examples of drayage, ports, trucks, competition, pretty much nailed the question about relevant market. I'm going to answer that question by also probably touching on the second question as well, which is, is there real a need for CSX to amend its complaint on relevant

market to be able to go forward.

I think Mr. Hatch answered that question basically, and I apologize to Mr. Hatch if I get this wrong -- but he basically said it's complicated so it should go to a jury. The defendants are on notice, so no harm, no foul, and the expert has calculated damages on both of the relevant markets that have been offered up, and so there's nothing new that needs to be done. And respectfully I completely disagree with that.

We need to address these questions in the context of what CSX has alleged in the complaint. How that theory of harm has changed with the advent of its expert, Professor Marvel, the market realities that are presented here, and how this entire marketplace works, and then of course the antitrust principles.

And I will say at the outset in terms of market realities, Your Honor said the damages that are alleged by CSX are for the exclusion from the market which went on for 20 years. Now, this marketplace is not static. It has not been static for 20 years. Things change all the time. That's going to be important when it comes to damages. And there is a *Daubert* motion that's going to be argued tomorrow, and so I don't want to get too deep into that, but I can say that the methodology that has been offered up, which is the only evidence being offered for causation and damages, is woefully inadequate not only just to address their alternative theories of harm -- which one are they putting up, which one are they not putting

up? -- but also just to test whether Norfolk Southern's conduct, and the Belt Line by extension, harmed competition. And that takes us to the antitrust principles.

The laws are intended to protect competition, not competitors. As a general matter, Norfolk Southern does not have an obligation to help out CSX or to open up its tracks to CSX. When antitrust is looking at whether there is a monopolist or market player who has market power and what they're doing in the marketplace, antitrust is looking at what choices did the customers have? The consumers? We have two different markets being alleged, one where the consumers are the ocean carriers and one where it appears that CSX is the consumer, and we'll get to that, but it's the ocean carriers that are at issue in this case here in terms of what were the harms. If you cannot define a relevant market that shows us whether Norfolk Southern's conduct was anti-competitive and harmed ocean carriers, meaning harmed competition, then this case can't go to a jury.

Now, I said already this marketplace is not static. CSX has alleged that this conduct went on for 20 years, but today CSX's output at NIT, which is the nexus of one of their relevant markets, is 10 times larger than it was in 2009. Ten times, Your Honor. They have grown. They have grown their share in the face of this alleged conduct.

And as to the port, the Hampton Roads Ports, so that's the nexus of their alleged relevant market, they have grown even

more. They have grown 12 times what they were over 20 years. How can it be that there is a monopolist playing in either of those markets when CSX has thrived?

Now, I understand their argument is that CSX did not do as well as they wanted to do or thought they should do, but that's not the question that antitrust answers. The question is, did a player with market power act in an anti-competitive way such that CSX was foreclosed? And that is word that's been used a lot today. One of the reasons that we focus on relevant market is because what is actually vigorous competition can often be mistaken as anti-competitive conduct. You can't tell the difference.

And here there is a lot of chuckling about some 2015 emails where someone is saying, hey, I'm not providing them a window until. Well, is that anti-competitive or is that just people doing their business?

What we know is that in 2015 nobody stopped the trains from running. There's not any evidence that CSX was prevented from running any train that it asked to run. That's not in dispute.

These other documents, these emails that have been displayed *ad nauseam*, a lot of them are subject to motions *in limine*, and it's not clear that they would ever see the light of day. But we have to remember to look, distinguish between what is said in an email and what actually happened. It's just a

reminder here.

Now, as I said, the conduct has to be assessed from the perspective of the consumers, and in this marketplace, that is the ocean carriers. There's lots of case law on that. And that's why the plaintiffs have to prove both the harm to competition in addition to injury and damages to itself.

Two different things: Just by defining a market where CSX is the consumer, CSX cannot avoid showing harm to competition otherwise. It cannot be done. And we'll get to that when I talk a little bit about the essential facilities doctrine.

THE COURT: Can I ask you something about that?

MS. REINHART: Yes.

THE COURT: When we're looking at this statute of limitations question and the requirement that there's an overt act with new and accumulating damages, I think is the wording, how does your argument about the conduct being viewed from the perspective of the ocean carrier play into that question? Or is that apples and oranges?

MS. REINHART: So the overt act discussion is looking at the conduct of alleged conspirators, correct? And the overt acts that have been alleged here all have to do with CSX being blocked. The economic evidence really is what shows harm to competition, and under the test, that economic evidence also has to meet statute of limitations requirements. In other words,

again, we couldn't base harm to competition on what happened in 2009. I hope that answers the Court's question.

THE COURT: All right.

MS. REINHART: So when looking at how to define the market we look at what the consumers' choices are, what choices did the ocean carriers have to get their cargo where it needed to go. This is, again, a very dynamic market. Your Honor, you've seen the briefing, you've read all the papers. That's quite clear. These ocean carriers come from all over the world, they berth in ports all along the East Coast, Canada, West Coast, and they move their products, their cargo containers from those ports to inland destinations, and then cargo containers come back out from inland destinations to the ports to be exported.

And so ocean carriers need to know, what options do they have? The question that economics asks is if one of the market players who serves those ocean carriers raised its price by, say, five to 10 percent, and the ocean carrier wanted to move away from them, say, Norfolk Southern wanted to move away from Norfolk Southern, where would they go? And that's really what has to be answered to define the relevant market.

There are two aspects to this: Geographic and product. And CSX's definition of the market, no matter which one you look at, is deficient and cannot be cured and cannot go to a jury for a couple reasons.

One, on the geographic side, Your Honor, in the complaint they define the market as freight transportation by rail in and out of the Hampton Roads ports. That's Paragraph 50 of their complaint, and I'm quoting it. So in and out of the Hampton Roads ports. Where is the cargo going? Is it going to Richmond? Washington, D.C.? Chicago? Maybe all of those places, maybe a lot more places. They don't define the origin and the destination. They simply say to and from Hampton Roads.

That market definition, the way they set it up, allows them to avoid the question that can be answered with dispositive facts right now what options do ocean carriers have? If the question is, ah, we're going to inland destinations, well, maybe you have different options if you're going to Richmond than you do if you're going to Chicago.

There is no dispute, no dispute, Your Honor, that for some length of haul from Hampton Roads, inland trucks dominate. It doesn't mean the railroads didn't also carry the freight, but trucks dominate. There's public data, it's in our record, from the port. Like 60-plus percent of the cargo carriers that are moved through Hampton Roads go on trucks, not railroads. And so railroads have a hard time competing. But that doesn't mean they couldn't compete if the ocean carriers want to use them.

So for these shorter hauls, it doesn't matter where the mileage cutoff is for purposes of this argument, it's just some length of haul. Maybe up to 500 miles. We have cites in

the record to CSX testimony that says, ah, 200 miles, ah, 300, 500. Doesn't matter.

THE COURT: Well, how specific would CSX have had to have been in the complaint?

MS. REINHART: They would have had to define a market that allows us to identify what the options are, and they didn't do that. They could have said --

THE COURT: For example?

MS. REINHART: So let's say Richmond. What's the options for between here and Richmond? Trucks. First and foremost. In fact, they probably do the bulk of it. But the railroads are part of that market too.

THE COURT: But aren't there so many -- aren't there so many potential destinations that there has to be some generality?

MS. REINHART: Sure. They could have defined it the way the routes are allowed with the contracts with the ocean carriers. That's less specific than I'm being in our back-and-forth here, but it's a heck of a lot more specific than their actual complaint, because they don't attempt, they don't attempt to identify destinations. They want to be able to say trucks can't compete because they can't go to Chicago, ports can't compete because they don't go to Richmond.

Now, the reality is, for the long hauls, Chicago, Detroit, some of the other places in Ohio where you're getting

on to 600 miles, a thousand miles, what is very clear in the record and not disputed, is that an ocean carrier will move, move ports, it will move from Hampton Roads to New York in particular if it doesn't like the service or the rates that it's getting from either of the railroads out of Hampton Roads. The record is very clear.

THE COURT: All right. So you're telling me that there's a deficiency --

MS. REINHART: Yes.

THE COURT: -- and you've pointed to the complaint so far. Is there more in the discovery about the market that potentially remedies the deficiencies you're pointing to?

MS. REINHART: That potentially remedies the deficiency?

THE COURT: Hm-hmm.

MS. REINHART: No, Your Honor.

THE COURT: Let's Say it can't remedy it. Let's say it can't remedy it: Is what is stated in the discovery, had it been in the complaint, sufficient?

MS. REINHART: No, Your Honor. They didn't attempt to define a market properly. That's just the bottom line. If they had attempted to define it properly we wouldn't be here now. There would be no case.

One cannot look at this entire industry and say okay, Norfolk Southern has a monopoly out of Hampton Roads. You can't

say that.

THE COURT: Why?

MS. REINHART: Why? Because, because market definition needs to tell us how much market power Norfolk Southern has, and if you don't know where the cargo is going, you don't know what options the ocean carriers have. It's just that simple. And we have lots of cases that we cited --

THE COURT: And you're saying you needed that level of specificity in order to defend against the case?

MS. REINHART: They needed a level of specificity on the very first flaw in their market definition, which is the geographic side. And it, it is not curable. It is not curable.

If they wanted to, I suppose, allege a complaint that has every route that you could possibly conceive of that the ocean carriers would travel, they could have alleged that in the first place. But they didn't. Instead, they changed completely and alleged a different market. A much narrower one. And so let's talk about that one.

By the way, the record is full of actually not-disputed facts that show that, for those long haul trips, New York/New Jersey is an alternative. Every ocean carrier has at least two choices of ports to take its cargo to and from for those long-haul trips, and then of course under a certain level of miles ocean carriers can use trucks instead of railroads. In either instance, Norfolk Southern cannot have market power. And

that's why their case fails there.

So looking at the new market definition which came only after a fact discovery and during expert discovery, Professor Marvel, their expert economist, redrew the market and redrew the theory of harm. It's just not just that he narrowed it. The relevant market as stated by Professor Marvel is on-dock access. So that's referring to access by CSX or any other railroad that will be serving ocean carriers, CSX being the only one.

So what he has done is he's gone from the proper inquiry to the extent he's asking -- CSX was asking in its complaint what are the ocean carrier's options, he has now made it a question of what are CSX's options. Two very different markets, different evidence, different analyses that should be done to assess that question. And I would submit not appropriate under the antitrust laws except in the context of the essential facilities doctrine, which is pretty much what Professor Marvel is stating here, and that doctrine has never been recognized by the Supreme Court and is very disfavored, and we don't think that CSX can prove what they need to prove to satisfy that. They certainly can't get past summary judgment for that.

So in this market as defined by Professor Marvel, the geographic market is no longer origins and destinations for ocean carriers, it's CSX's access to a single terminal in

Hampton Roads. That's it. And the question that Professor Marvel wants us to answer is what are CSX's choices to serve its customers, the downstream market, the ocean carriers, if they don't have on-dock access.

Now, for CSX to take this to a jury, this Court would have to agree that it does not have any other reasonable options to serve its customers, the ocean carriers. We know that's not true. Look at their share of the rail traffic coming out of NIT and coming out of Port of Virginia more broadly. They're serving their customers.

We know that they use drayage. Maybe there is some facts about is drayage better or is it preferred or is it worse, is it more costly? Those questions do not need to be answered. The fact is it's an option. It's a reasonable option for CSX. And they have proved it: They have grown their share at NIT through drayage. They may not like that they're not making as much money as they wanted to, but they kept doing it. And by the way, Professor Marvel has no analysis, he has not done the work to show that somehow drayage is prohibitively expensive. He hasn't done the work. It's not in the analysis for purposes of causation or damages.

We also know that CSX can and has used the NPBL to access NIT, just pay the switch fee. They have never been denied when they have asked to move a train to NIT. And they haven't shown, not in the record, that they couldn't to it.

They have some noise about what would happen if they tried to run so many trains through there. They could do it. We know that they do run on NPBL. They pay that switch rate to go other places on the NPBL. They move a lot of traffic under that switch rate. A lot. Thousands and thousands of cars. Just not the international intermodal. And they say it's because it's too expensive to do it on the intermodal side, the economics don't work. That analysis has not been done. It has not been done. It appears nowhere in the record or in the expert discovery.

We know that CSX can and does serve their customers through the Virginia International Gateway, VIG. That's the terminal that's right across the river. It's right there. And we know they have got the bulk of that traffic. Between CSX and Norfolk Southern at VIG, CSX dominates. It's a fact. The numbers are clear. There's no dispute.

And they increased their share at that terminal 12-fold over this period when supposedly they were shut out. Their ocean carriers don't care whether the track moves from NIT or VIG. CSX will say that's a dispute. The reality is, the contracts with the carriers don't specify. Says Hampton Roads. The port steers the traffic one way or the other, everybody gets served, the customers get their transportation through one or the other terminals.

And then of course CSX can and does serve its

customers through the Port of New York. Very ably. So any traffic that has to go to Chicago, Detroit, any of those upper midwest places, CSX actually has the best route to get out of New York. They dominate the New York port. They can move business up there to service that part of their customers' traffic.

So they redrew the scope of this relevant market.

Your Honor has asked a couple times why did CSX do what it did? My view on this is that they understood, they understood that if they're alleging a straight-up relevant market of traffic between Hampton Roads and actual destinations, that there are truck options, there are port switches and options. They also of course understand that they have actually improved their position significantly over the years, and so what they have to do is show that they're shut out from NIT. They can't do that unless they satisfy the essential facilities test, which, happy to go through it in detail, but again, that test looks at whether they're prevented from serving their downstream customers, and that means ocean carriers. I have just shown that they're not. They may not like the options that they are using, but that does not make an antitrust violation.

THE COURT: How much more expensive does it have to be for it to be unreasonable?

MS. REINHART: Well, that's a good question. That's a question that Professor Marvel should have looked into and did

not. It would have to be prohibitively expensive. I mean, they have not even tried to show that they would be operating at a loss. They have not attempted to do that analysis. And it would be straightforward to do.

They had, instead -- and again, I don't want to preview too much about tomorrow, but Professor Marvel has this model that looks at NIT traffic and basically says if the ocean carrier uses NIT more than it uses VIG, then it's beholden to Norfolk Southern because drayage by CSX isn't good enough. Now, that's the premise of the model. And what he analyzes are the movements out of NIT either by CSX or Norfolk Southern, just for those carriers that do a lot of business at NIT and his machine spits out an answer that he interprets as being that Norfolk Southern is a monopolist, they charge higher prices and they have higher margins because of this phenomenon at NIT. It's the Marvel Machine. That's the problem this is coming tomorrow. That Marvel Machine, if you look at VIG and you run the exact same test, don't make a single change, CSX is the monopolist, CSX can charge higher prices, CSX has higher margins, CSX has the bulk of share over there at VIG. We don't, we don't see how Professor Marvel's model assesses the question of is Norfolk Southern responsible for CSX's experience here.

What we know it does not do, it does not assess the actual economic choice that CSX has and whether it was reasonable for CSX to do what it's been doing for 20 years,

meaning using drayage, choosing not to pay the rate for intermodal, and using VIG and serving its customers through New York.

So back to Your Honor's original question on this, why isn't the definition of relevant market a question for the jury at this stage, the facts that are undisputed show that CSX had options, reasonable options, options that actually did let them serve their customers.

And if you're looking at the CSX relevant market that's actually in the complaint, the ocean carriers had their options as well.

And so the market -- either market is not defined properly, and either market is not of the quality that would be necessary for you to assess whether Norfolk Southern's conduct was even anti-competitive, let alone whether it affected CSX.

Again, we have a number of cases, Your Honor, where this very question was decided at summary judgment and the facts were well developed. There are facts that were cited by the plaintiffs and facts cited by the defendants, and yet relevant market was decided and not sent to a jury. In Monsanto, It's My Party, Pepco, Laurel Sand & Gravel, and I'm sure there are more. Those are just the few that I could remember.

So that takes us to the second part of the question: Is there really a need for CSX to amend?

It's too late, first of all, for them to amend. This

isn't just about changing the words on the page in a filing, this is about the work that the economist has done.

This goes to the damages question too, Your Honor. Your Honor asked a question about Venn diagrams and the types of damages that CSX is alleging here. And the bottom line is that Professor Marvel's modeling does not distinguish between the kinds of damages that could come out of this conduct. Whether it's damages from old conduct, such as putting the switch rate in effect, damages from the supposed exclusion in 2015 or damages from 2018, it can't distinguish.

And this is important, because as I said, at the outset, this is not a static marketplace. Antitrust does not look at causation or damages in a static way. CSX, in late 2016, gained, after lots of investment, its ability to double stack trains out of Hampton Roads. That was a game-changer for them. Any analysis of Norfolk Southern's competitive conduct, the NPBL situation, the port as a whole, cannot, cannot be done properly and soundly without that kind of game-changing event being considered as part of the analysis. I mean, it did, it changed the world for them. They didn't have that. They couldn't complete with Norfolk Southern out of Hampton Roads. Norfolk Southern already had the double-stack. Again, this is just the market reality. Professor Marvel should have looked at that sort of market event, should have looked at the things that caused CSX to not be as strong in Virginia as they are in New

York, just like Norfolk Southern's not as strong in New York as they are in Virginia? He should have done an analysis. Should have analyzed the different types of conduct that would cause different kinds of harm, and he didn't do it. He simply used that Marvel Machine, this strange regression analysis. And I say strange -- we're not against regression analysis, but this one looks at some odd, odd components of the marketplace and ignores all of the ones that actually make a difference. He shouldn't have done that.

So it's too late to amend. Amendment wouldn't be enough. Professor Marvel's opinions are supposedly complete. It is too late for him to do new analysis. It is too late for him to take what he would read in the transcript that I'm saying today and supposedly fix things.

And by the way, it's not appropriate for this case to go to a jury and at that time, in court, during the trial, have him change, do no calculations, run up knew models. It's just not right.

I think that's all I would have on relevant market.

On the injunctive relief, I drew that straw as well. I certainly agree with Mr. Snow that if there's no damages, there's no injunction. I was trying to think, Your Honor, of how this would go. It would at least -- there would at least have to be some kind of evidentiary hearing, potentially discovery. It's not clear what the relief is going to remedy if

there are no damages, if there's no harm. We do have the STB proceeding.

A couple of options, Your Honor: One would be to wait for that to be decided, or another option is to do some briefing on this question and get some clarity on how this would all unfold. But bottom line for me, Your Honor, is --

THE COURT: So -- I think I know your bottom line.

So back to this argument about 2015. If the Court were to find that the temporary loss of business of CMA that is alleged in 2015 was a sufficient overt act and that it was new accumulating damage, can't be very much money. But if I were to find that, but the Court were to disallow the damages expert of CSX, then could we proceed to trial on those limited CMA damages, that loss of that client for some weeks, or on the injunction relief claim?

MS. REINHART: No. We cannot proceed to trial on that claim. It's, first of all, completely different from the alleged foreclosure occurring over a period of years. There is not a record that could go to the jury about causation. There is an email, perhaps maybe two emails. That loss has to be put into the context of, first of all, a properly defined relevant market, and then, second of all, an analysis of causation. Did Norfolk Southern really cause that? Did the NPBL moving the trains as they were asked to move them really cause that? I mean that's, that's a record that is fully developed here and is

not sufficient to go to a jury.

I would go back to my first point though, Your Honor. I'm rambling a little bit because it's an interesting question. But it's not the same case. It's not -- there's no expert testimony that could come in for that particular limited claim.

THE COURT: Okay.

MS. REINHART: Yeah.

THE COURT: So on the limited damages claim from the CMA or the loss of the client CMA for that short period of time, if I were to find that that was a new overt act with accruing new accumulating damages, you don't, we couldn't go to trial, you think, because there's no expert opinion on the, on the what?

MS. REINHART: There's no expert opinion on either causation or damage that would show that Norfolk Southern or NPBL is responsible. The loss of one contract in the context of this entire marketplace and CSX's performance in it is like a pebble on a lake. The analysis that has to be done to find out if, No. 1, Norfolk Southern had market power sufficient to hurt CSX; No. 2, actually did, meaning there's causation didn't happen for some other reason.

And then damages. That analysis has to be done in the context of all the business. What Your Honor is describing is a claim that wasn't brought. They could have brought that claim for $2,000.

THE COURT: All right. So change it up a little bit then. That's the damages question. What about injunctive relief?

MS. REINHART: If there's no ability to prove damages there should not be any injunctive relief.

THE COURT: Mr. Lacy said it was a standing issue. I think. If I recall correctly.

MS. REINHART: And I apologize that I don't recall, Your Honor, and perhaps maybe that's reason enough to have a little follow-up work on this particular issue.

But in my view, if you don't have damages you don't go to a jury with an injunction, because the question, the question is what is the case? What's the jury being asked to decide?

And by the way, to follow up on my later point, thanks, Mr. Lacy, on the CMA question too, there is a hearsay issue. The evidence is from CMA and that is hearsay. They're not coming to trial. In fact --

THE COURT: Well, let me ask you -- no, I'm going ask him about that. I won't ask you. I'll ask him. Later.

MS. REINHART: And one more point. There's no continuing harm to enjoin on the CMA question because CSX got the business back after a very short period of time.

THE COURT: All right. Thank you, Ms. Reinhart.

MS. REINHART: Thank you.

THE COURT: Is that it? Was there somebody else on

this side that was going to address a point?

Mr. Chapman, were you going address a point? Or was there -- I thought somebody said that there was another person. Was that it?

MR. CHAPMAN: I don't think anybody else is speaking for the Belt Line.

THE COURT: Okay. Did you all have somebody else, Mr. Lacy?

MR. LACY: No, Your Honor.

THE COURT: Okay. Thank you. So Mr. Lacy --

MR. LACY: Yes, sir.

THE COURT: -- let me ask you a few questions before I go back to CSX.

MR. LACY: Sure.

THE COURT: You did say, I thought, that there would be an absence of standing to proceed on injunctive relief if there were no damages.

MR. LACY: Yes, I did frame it as a standing issue, Your Honor. And the other thing I would add is what's the injunctive relief sought here? If it relates to the 2015 moves, if that's what this case is about, that obviously happened in the past, so there is no, you know, injunctive relief that can change the past. The question is what would the Court be asked to enjoin in the future? And I would submit to the Court that you would essentially be sitting in the role of a train operator

to make sure whether, to the extent that the Belt Line is asked to move trains in the future, that -- I don't know what. What would be the injunctive relief that...

It's just, it's, it's -- it's void for vagueness.

And I would add that in order for injunctive relief to be awarded generally you have to show some irreparable harm, right? That is the standard for injunctive relief. And we would submit that CSX can't show irreparable harm. Not only for -- well, really for the reasons that Ms. Reinhart just laid out, their share at both NIT and the Port of Virginia more generally has continued to increase, you know.

So those are the, some of the many questions or concerns about the Court's question. And like Ms. Reinhart mentioned, if that's all that's left here, I do think briefing might be helpful. But I still think it's a standing issue first foremost.

THE COURT: You say based on a case that...

MR. LACY: Well, Your Honor, I don't think we cited a case in our brief, but I base it on the fact that, you know, traditional Article III standing requires damages, right? And you know, we're talking about potentially entering -- or discussing entering an injunction about something that happened now eight years ago. And I don't see how or what the injunctive relief would be at issue. And so --

THE COURT: So would the same thing apply -- if we're

looking at 2015 and, back to our earlier discussion, we're trying to figure out if there's a new accumulating damage, one could argue that the loss of CMA for a period of time would be a component of damage that could potentially satisfy that requirement. But you could also argue, I suppose, that payment of excessive prices during that year for the use of the terminal would be a different kind of damage than the overlapping damage that I was talking about earlier when I was discussing exclusion by rate versus exclusion -- not versus, maybe. And. And exclusion physically. And so those are two potentially different types of damages from 2015. And is either of those enough to seek injunctive relief? And you are telling me that damages is a traditional component of Article III standing. So --

MR. LACY: Your Honor --

THE COURT: -- I guess you have to get over the hurdle of can those damages be proven, have they been pled, have they been disclosed properly, but if you can, if you get past that, are they enough?

MR. LACY: Well, Your Honor, I of course do not believe they have been pled or proven. To use the Court's Venn diagram, let me take the payment of the switching rate by CSX in 2015 to move those trains. You know, if you have a Venn diagram that is based on the Marvel damages model, it's over here and it's talking about lost profits caused by foreclosure, inability

to access NIT, what the Court is talking about is something that there wouldn't be overlap because that's not -- they're talking about super-- allegedly supercompetitive prices that were paid in 2015 which is not part of the model at all. They have not -- they have not pled that, Your Honor. They have not proven that.

And that's a good segue to the other aspect of damages, CMA contract.

THE COURT: So had it been pled, had there been damages evidence, it might be sufficient for a new overt act with accumulating damage.

MR. LACY: And I would submit to the Court we probably wouldn't be here for the $2,000 of switch rate fees that we paid --

THE COURT: All right.

MR. LACY: -- okay?

But it's a good segue to the CMA contract. As Ms. Reinhart said, fundamentally there's a whole lot of causation problems. Because as I'm sure the Court picked up on when reviewing the record in preparation for today's hearing, there is not a single direct statement from an ocean carrier to say, yes, we stopped using CSX in 2015 because of some delay in moving trains out of NIT for a couple weeks. In fact, you won't, if -- it shouldn't go to trial, but if it does, you won't see an ocean shipper. You won't see anything from an ocean shipper. There's no depositions, no nothing. It's all hearsay.

But let's put that to the side. That is the subject of a motion *in limine*.

The way the damages model is constructed, Professor Marvel intentionally did not determine that the loss of the CMA contract for that period of time, assuming that is true, was in fact caused by the slowness of the movement of trains in 2015. Nor did he attempt to quantify any type of damages.

So Your Honor, in a hypothetical world, had that been done, perhaps. Perhaps. But it hasn't.

And you know, you asked me a question earlier about whether the Court has discretion to allow some type of revision with respect to CSX's damages model. And I would point the Court to Rule 37. We looked at that at the break. And Rule 37 does not grant the Court discretion *per se*, it talks about was it reasonably justified that this damage was not disclosed in the case or is it harmless?

Well, we submit that CSX can't satisfy either prong. There is no reasonable justification that this specific question about payment of switch rates in 2015 did not come up until their opposition brief to our motion for summary judgment in a single line, which I would add was contradicted by the next line which said no, no, we are not relying just on that, we are relying on the totality of the conduct.

And I would also say that obviously such amendment wouldn't be harmless to Norfolk Southern. And of course

Mr. Snow can speak for the Belt Line, but I think he would agree it would be incredibly prejudicial.

THE COURT: All right. Let me switch gears on you.

MR. LACY: Sure.

THE COURT: I was asking earlier about -- I think it was Mr. Snow -- what would be sufficient for a new accumulating injury where, you know, Mr. Hatch says, look, you can't just let this go on from 2009 forever. And that can't be what antitrust law permits.

MR. LACY: If I may, can I just grab a case? Because I think --

THE COURT: Sure.

MR. LACY: I think the Klehr case, Your Honor, speaks to this very issue, which of course really is the highlight of the --

THE COURT: You didn't let me finish my thought.

MR. LACY: Sorry. Sorry.

THE COURT: So when testing the underlying, the gravity of that argument by CSX, you know, I was trying to think about what could be a new accumulating damage. So let me ask this:

Suppose in 2018 there had been a motion to the Board of Directors of NPBL for a new rate to be considered, and I guess a referral to a rate committee, and then there was a vote, and Norfolk Southern's directors voted down a new rate. And

maybe it doesn't matter whether CSX's people voted or not. But let's just say for the sake of argument they vote against it. Then we might, we'd be in a different situation, wouldn't we?

MR. LACY: Yes, we would, Your Honor. That would be a good old-fashioned business judgment rule case.

THE COURT: And then this overlapping becomes this with a new event?

MR. LACY: Well, assuming it was a breach of fiduciary duty.

THE COURT: Assuming.

MR. LACY: Yeah, assuming.

THE COURT: But then you may get to reach all the way back to 2009 for contextual facts, but not for damages?

MR. LACY: I would suggest, Your Honor, that the Court would follow the decision we -- one moment.

That dealt with this particular issue as it relates to the evidentiary matters. It is the case out of the Middle District of North Carolina, the Mid Electric case. In that case, the judge said not only can you not rely on damages caused by conduct occurring outside of the limitations period, you can't rely on the evidence associated.

THE COURT: Okay. Well let's say the evidence is out.

MR. LACY: Okay.

THE COURT: But...

MR. LACY: Okay.

THE COURT: For the sake of argument you can't refer to any of that. We'll just say that.

MR. LACY: Sure.

THE COURT: But that vote would be a new overt act with accumulating...

MR. LACY: I would submit to the Court at that point you're so far afield from a continuing violation, a continuing conspiracy that it is not a new overt act. That is --

THE COURT: That's just a new antitrust violation, potentially?

MR. LACY: No, Your Honor. I don't think it rises to the level of an antitrust violation. As I said earlier, that's a simple, garden-variety was that vote a breach of fiduciary duty. And that claim belongs to the Belt Line. Certainly it can brought derivatively by shareholders if the Belt Line decides not to pursue it, but that is way far afield from an antitrust violation. That is corporate governance.

THE COURT: Okay. I think I understand the nuances of your position.

MR. LACY: Your Honor, in closing I just wanted to point out, again, I rely a lot on Klehr, but you know, the Supreme Court did address the competing principles of this context of enforcing the statute of limitations and CSX's position that how can you let this purported conspiracy go on and on. And I would point the Court to Page 187 of the Klehr

decision, where the Court said that, they concluded that "The Third Circuit's rule is not an -- an improper interpretation of the law." And they say for two basic reasons. "First, that several other circuits have pointed out the last predicate act rule creates a limitations period that is longer than Congress could have contemplated." And that's exactly what would happen here if these claims were allowed to go forward. "Because a series of predicate acts including acts occurring at up to 10-year intervals can continue indefinitely, such an interpretation in principle lengthens the limitations period dramatically. It thereby conflicts with a basic objective repose that underlines limitations periods."

So that harkens back to the treatise that the Court read from probably a couple hours ago. So...

THE COURT: Okay. So final question for you.

MR. LACY: All right.

THE COURT: Norfolk Southern has said that CSX can't change its damage model to avoid the statute of limitations. What discovery response can you point to that would allow the Court to say that paying the high rate in 2015 or those CMA loss of business damages have essentially been waived such that the damages case should be shut down on summary judgment?

MR. LACY: Sure, Your Honor. We asked, and the Belt Line did as well, an interrogatory that said provide us your damages and how they're calculated. That interrogatory

answer -- and we refer to it in our summary judgment, it's part of the summary judgment record -- said see our expert report. That expert report, as we've discussed today, did not quantify those damages. In fact, it specifically rejected the idea that CSX's damages were based on a single event. Mister -- or Professor Marvel explicitly that stated his damages are based on the totality of the circumstances. They specifically and intentionally did not do what the Court's hypothetical suggests they might have done. They made that affirmative choice, they have to live with it.

THE COURT: All right. I do have one more. Sorry.

MR. LACY: That's quite all right.

THE COURT: One more. So that letter that CSX submitted from their then-Board member who is like an associate counsel at CSX?

MR. LACY: Mr. Armbrust.

THE COURT: Mr. Armbrust. That letter, it's not sworn. Does that have the ability to create a genuine issue of material fact as it is?

MR. LACY: No, sir. That's no different -- it's hearsay, and it's no different than CSX submitting a declaration in opposition to our motion for summary judgment that they create the factual issue. The Board minutes say what they say. Mr. Snow put up on the screen I believe the testimony about what happened at that board meeting. And so that is simply not

enough to create a genuine issue of material fact, Your Honor. I don't think there's any question that the rate --

THE COURT: Where it's opposed?

MR. LACY: What's that?

THE COURT: Where it's opposed?

MR. LACY: Oh, certainly. Yes. We don't agree that that is a correct recitation. I mean, it is undisputed that no member of the CSX -- of the Belt Line Board moved for adoption or approval of the rate proposal at that board hearing.

THE COURT: All right. Thank you.

Matthew, would you let them know that my three o'clock call needs to be moved back and I'll make it when we finish? Thank you.

Well, Mr. Hatch. We've come full circle.

MR. HATCH: With the Court's indulgence, I'll come full circle and start where we started with the statute of limitations --

THE COURT: Okay.

MR. HATCH: -- Your Honor, which is where Mr. Lacy started.

If I could, I think -- I didn't catch the word you said, something to the effect that I offered a conceptual or some type of word like that. A better word, I'm sure. But I'll start with the conceptual framework and then I'll go right to the cases. But I think this explains all the cases the Court I

know is reviewing around this issue.

So proposition one: You do not get to commit a monopoly or a conspiracy to monopoly into perpetuity just because you weren't sued in the first four years. You'll find that all through the cases. So the fact that you weren't sued in the first four years but you continue to conspire to monopolize, that is a antitrust violation, and as long as you're sued within that continuing time period, you're subject to antitrust suit. Point one.

Your Honor's asked several questions about the 2015 move and whether there was some, you know, marginal damages associated with paying the rate for the lost business to CMA. And I think conceptually let's say that they monopolized 95 percent of the market outside the statute period, okay? And inside the statute period they say, you know what? We want to get 96. So they do one more percent of monopolizing the market. You're not limited to just -- that's an overt act, right? They had 95 percent, they took some additional overt act to get one more percent of the market, you are not -- assuming you sue timely on that overt act -- limited to just damages for the one percent and you have to stick with the 95 percent. And that's in the cases I'll talk about in a second.

You may be limited and not able to recover for the damages that are outside the statutory period plus four years from when you brought suit, but within that period you're

entitled to your antitrust damage. And here's is the key last conceptual piece.

THE COURT: If you have the...

MR. HATCH: Overt act.

THE COURT: The new overt act. And what?

MR. HATCH: And damages.

THE COURT: And new accumulating damages.

MR. HATCH: Yes. But those do not need to be different in kind from damages you have suffered before. And this brings me to the point.

THE COURT: Okay.

MR. HATCH: The Court looks at damages which are injury, and a court assesses injury and resultant damages based on the cause of action. If you're in a price-fixing case you're looking at overpayment, right? I should have paid this, you price-fixed above it, that's the nature of my injury.

If you're in a trademark case, you're looking at injury from theft or use of a trademark, that sort of thing.

Here, we're talking about monopolization and maintenance of monopolization. And I think that word maintenance, which in the cause of action, is critical because a monopoly works because you maintain it over time.

What does maintenance mean? Well, it is fierce competition. These are the only two Class I railroads on the East Coast. It's fierce competition generally between them.

Every day CSX looks to compete and gain business against Norfolk Southern and vice versa. So every day they have to maintain that monopoly position. Every day that continues the action that then causes the injury and the damages: Maintaining the monopoly position, foreclosing us from that market, which is different --

THE COURT: By overt acts.

MR. HATCH: Overt acts bring it within the statute, and what's in the statute is the damages that is caused by the cause of action, which is monopolization. So you don't lose the cause of action as long as you sue within the statute. And we'll see that in the cases. You may lose the old damages, we recognize that, but you don't lose the cause of action.

That distinguishes it, and that's going to bring me to Klehr, which Mr. Lacy talked about a lot, which is a RICO case. And yes, Klehr is, we all have talked about, uses the Clayton Act because they share the same, but the cause of action is different. That is a racketeering conspiracy, and you need to have a certain number of predicate acts. And there they bought the silo that the plaintiffs bought outside the statutory period. And as I think Mr. Snow put up on the board when he showed a portion of the case, what the court was saying is your damage, which all flow from my buying that silo -- not trying to buy new silos, not trying to compete for silos -- you bought a silo, your damages were incurred when you bought the silo, the

predicate acts under RICO, not under -- different from overt acts, antitrust -- the predicate RICO acts that you have pointed to that are within the statute did not harm you, they were sales to other farmers, you already had your silo, but you said you sold silos to other farmers, and there were advertisements, but you already had your silo. So yes, they would be RICO predicate acts, but no, they did not cause you any new or different harm. You already had the silo that was causing you the harm.

I think that's critical, because there they're suing for fraud, they're suing for a RICO on a silo they bought. Here, we're suing for the type of market preclusion that you have to maintain -- that's our allegation -- they maintained each year during the statutory period.

And I want to get through the cases, but I will start with -- and by the way I'll just quickly say on the XY, LLC case, Your Honor, I think you'll also find that there, the breach of contract that was the basis for the suit occurred prior to the statutory period and the damages flowed from the breach of contract, not here, ongoing preclusion from the market. So breach of contract was like the silo in the XY case. I don't know if -- Your Honor may not have my demonstratives in front of you still, but I didn't hear Mr. Lacy or Mr. Snow or Ms. Reinhart ever take on that first quote on Page 3 from Zenith. In fact, I didn't hear anybody analyze the actual language of the Zenith case. That quote at the top of Page 3 on

Zenith is exactly what we are doing here: We brought an action, ongoing conspiracy, there's four years, do we need to show that the proximate result of the conduct occurring more than four years prior to the filing of the counterclaim, do we need to disaggregate that from our damages? To the Court's question, do we need to show that somehow these are not damages from earlier rate-setting or preclusion.

HRI contends and the Court of Appeals held that the statute permits for recovery only if those damages caused by overt acts committed during the four-year period. That's the proposition, they're saying. You can only get the two-dollar -- you know. "We do not agree." They never addressed it. That cannot be clearer. If you read the whole Zenith case, the damages are what we did here. They took four years that were within the statute, not more -- you know, they weren't allowed to proceed on the older damages for more than four years, they took those four years, it was a measure of market share in the Canadian market, there was some other markets involved, they took that market share, which is basically what we have done here, and they applied it. And the Supreme Court approved that.

And the other piece that I think is so key about Zenith, Your Honor, and Ms. Reinhart, I want to come to her argument, I'll try to do these in order, but this was so critical. Zenith talks about whether your damage would have been speculative if you sued at the beginning. So let's imagine

we sued in 2009 when they first rejected the rate we proposed. Ms. Reinhart told you they couldn't base their harm to competition based on what happened in 2009. It's a dynamic market. She told you we gained market share during that time. And she also told you that double-stack capacity for CSX was a game-changer. Those are her words. That occurred within the statutory period. It changed the world. We couldn't compete before.

I think that shows if you sue in 2009 what would they have said? We don't know what the damages will be, you're a single-stack, we're double-stacking, you can't complete here, you know, it's speculative. That would have been the fight in 2009 because you would be looking totally forward on damages.

We have admissions the market is dynamic, the market changes, the competitors change in their capability during the statutory period and that's why you get to proceed on the damages for preclusion within the Statutory period.

THE COURT: That makes little sense to me, I'll tell you. Because if you have an expert who is able to look at the market, knows what the market is and defines it properly, they should be able to make which calculation year by year. I mean, that's the -- that's just the hard work that has to be done, and it can be done. I'm not sure that Norfolk Southern was suggesting that that couldn't be done. I think what they were saying, what she was saying is that the expert has to do that

work. Isn't that what she was saying?

MR. HATCH: I think what she -- well, first of all, I think she was saying that a lot has changed in the market over the time period.

THE COURT: And that the expert has to do the hard work of delving into all that and giving a detailed opinion that takes it all into account.

MR. HATCH: I will grant you that she's also arguing that, and I'd leak to address it. But my point is, Your Honor that's why Zenith talks about why you can get your within-statute damages is because they would have been speculative if you brought them at the very first act. And I think that just demonstrates they're saying the market changed, you should look at all those different things, it would have been speculative how far out, for example, if we were to have sued in --

THE COURT: I get that. If you go out more than four years.

MR. HATCH: Yeah.

THE COURT: -- then you get into a realm where an expert perhaps can't provide the kind of clarity that you want in the law.

MR. HATCH: So we have that for the last four years, and we can talk -- I'll come to her arguments on the expert. But we now have historical damages assessed, and you wouldn't

have been able to bring that in 2009. That's what Zenith is talking about. They said, well, how do we bring the damages for 50 more years assuming they never abated, never changed their conduct, that would have been totally speculative.

And so that's why you can get, what the cases say, within the four-year period you can get the damages that you have within that period.

One last thing on Klehr -- two last things, I guess. Sorry, does Your Honor have a question?

THE COURT: No, go ahead.

MR. HATCH: Mr. Lacy mentioned, read from Klehr about the predicate acts bringing it in. I think that part of Klehr would not be pertinent here. That's talking about RICO predicate acts over a 10-year period which are different from overt acts within the antitrust context.

And Klehr did not purport to limit, change, in any respect, Zenith. So I really think Zenith is the most direct, on-point case for antitrust in the specific way we've gone about calculating damages here.

On this issue about who bears the burden of showing continuing conspiracy versus an affirmative defense, I respectfully submit that's immaterial at this stage. We have put evidence in the record to show a continuing conspiracy, so that's established whether we bear the burden, whether they bear the burden of an affirmative defense.

Let me come to the 2015 events again. The Court's asked a lot of questions, and Mr. Lacy talked, oh, that's just something totally separate or different, limited. What 2015 shows you, before they had the exorbitant rate that was preclusive by itself, what 2015 shows you is that they can't effectively move the trains -- or won't, by virtue of the actions, what we have alleged -- they can't even do it if you try, right? They slowed us down. It's not whether they ultimately delivered all the trains that were tendered. The time and efficiency are critical in industry. And so the fact that it wasn't operationally successful -- and we have plenty of witnesses to talk about that from CSX's evidence, they can dispute it at trial, but the fact it wasn't operationally successful shows the world that it won't even work for them to come in at the high rate.

And I would like to refer the Court, there was some discussion about whether this is part of our damages, whether this is within the scope. Dr. Marvel does talk about this in his report, Your Honor. I'll just reference a couple parts, but on Page 28, this is in a section entitled NS's and NPBL's Alleged Conduct Forecloses CSX From Competing Effectively Enabling NS To Raise Prices To Ocean Carriers, and he says "NS's and NPBL's alleged conduct in the relevant market for the provision of on-dock access" --

THE COURT: Wait, wait --

COURT REPORTER: Could you slow down, please?

THE COURT: -- wait. Slow down.

MR. HATCH: I'm sorry, Mr. McManus.

I'll skip to the key part here, Your Honor. I know the Court has it in the record. "First I show how NPBL's extraordinary high switching rate and other measures aimed at reducing NPBL's service quality foreclosed CSX from obtaining on-dock rail access to NIT." So rate and service quality.

THE COURT: Does it say what those other measures were?

MR. HATCH: And then Paragraph 60, Your Honor, he talks about -- this is on Page 30, "NS also impedes CSX's on-dock access to NIT through its control of critical scheduling and operational plans for trains moving to and from NIT. In 2015, the one time that CSX attempted to move trains to NIT via NPBL, it took several days to move these trains from a CSX yard to NIT, which is only a 17-mile trip that would not normally have taken more than 10 hours. Correspondence between CSX and NPBL reveals that the main impediment was; that NS prevented NPBL's movement over to NIT because of operational issues'. In effect, NS appears to have the power to block CSX trains from accessing NIT."

THE COURT: Did he go on to segregate the damage from those other measures?

MR. HATCH: No. He didn't. And I don't make a claim

he segregated the damages. He calculates the damages, again, like in Zenith, market share by year.

To Your Honor's question, I'm jumping around a little bit here, but you can establish damages through lay testimony. And Your Honor had several questions back and forth with Ms. Reinhart about if the damage model was excluded -- of course we do not believe it should be -- but Dr. Marvel testifies to relevant market, to harm to competition and to customers. Those are not damage calculations, those are assessments of harm to competition. And so this is testimony he's given that would establish relevant market, does establish harm to competition regardless of whether his damage computation model comes in, and you can prove in the case of the CMA/CGM, you can prove that through lay testimony as well.

THE COURT: Okay. So if you can prove it through lay testimony, have you disclosed that in your discovery responses?

MR. HATCH: I believe so. Because as Mr. Lacy said, we pointed them to our expert reports and the 2015 impediment is in our expert reports.

THE COURT: No, I mean have you pointed to what the lay testimony is going to be about the specific damage?

MR. HATCH: I don't believe we did that in the interrogatory responses.

THE COURT: All right. Thank you.

MR. HATCH: One thing I did not believe I heard Mr.

Lacy or Mr. Snow or Ms. Reinhart contest is that in the antitrust context, like in typical conspiracy contexts, any act can constitute an overt act in furtherance of the conspiracy.

Now, Mr. Lacy did talk about the Ames case, which he asserted they have an absolute right to vote their shares. Ames is not an antitrust case, that's a Virginia law case.

You may have a -- this is, I think, where there's not a meeting of the issues among us. You may have a contractual right, but then if you exercise that right pursuant to a monopolistic or conspiratorial plan it can still be an overt act in furtherance of the conspiracy. Ames says nothing. That's not the case. I would -- that was, I think, a stock broker suit against a bank objecting to a contract with another bank.

I would direct the Court to the Kolon case, and there the Court, in a Section II Sherman Act case, this is Dupont v. Kolon, 637 F.3d 435, 2011, the Court said "To run afoul of Section II, a defendant must be guilty of illegal conduct to foreclose competition to gain a competitive advantage or to destroy a competitor," citing Eastman Kodak. "Conduct that might otherwise be lawful may be impermissibly exclusionary under the antitrust law when practiced by a monopolist.

"Indeed, a monopolist is not free to take certain actions that a company in a competitive market may take because there is no market constraint on a monopolist's behavior. And although not *per se* illegal, exclusive dealing arrangements can

constitute an improper means of acquiring or maintaining a monopoly."

So again, it's not *per se* illegal -- they're using the example of exclusive dealing arrangements -- to have those, but if you do it as a monopolist it can become illegal or it can become part of that cause of action.

THE COURT: You've heard me ask a question of Mr. Lacy about the 2018 conduct and the letter that you used from Mr. Armbrust. Is that something that you think I can rely on to show a genuine issue of material fact?

MR. HATCH: Yes, Your Honor. Mr. Armbrust was disclosed. He's a witness. He was deposed in this case. He wrote this letter, and he's -- we've submitted his facts as part -- I mean, they're not separately delineated, but they are within the summary judgment material. So I think that the Court can rely on that. We expect him to be a witness.

THE COURT: So he said -- I'm sorry, he said in his sworn deposition what's in the letter?

MR. HATCH: I would need to confirm that, Your Honor. I'll check with my colleagues in a moment. I don't want to misspeak on that.

THE COURT: Okay.

MR. HATCH: If I could get the Court's indulgence on that?

Your Honor, I don't think there's an issue that he

will -- he's an available witness who was disclosed and, you know, they have his information.

I also think there was no response from any of the three defense counsel who argued -- I talked with the Court about the trackage rights dispute. That, I think, is another overt act within the statutory period, and I didn't hear any of them address how that dispute squares with their representations that the one controls the other. How they could have a litigated dispute that wasn't pretextual. So that's not to resolve today, but it's an example of there may be disputed facts about that that merit going to trial. In other words, I've never seen one business that literally controls another that ends up in adverse litigation with them. Didn't make any sense. They haven't tried to explain it.

Switching to Mr. Snow's argument -- although I'm happy to address any question the Court may have if I didn't touch on anything from Mr. Lacy -- Mr. Snow said there's no dispute that -- he argued the Laurel Sand case and that their rate is set at their costs and so there can't be a dispute. The 210 rate may generally be set to cover costs, but that does not mean that the lower rate for the specific service that we were seeking does not also cover costs and generate revenue and profits. And in fact, before the 2009 rate committee they had different rates in their tariff, this isn't disputed, for service to NIT International intermodal service and other types

of service. So they've had different rates before. And it is at least disputed, although there's really no evidence against it, that every time NPBL assessed itself whether it would make not just revenue but profit on CSX's proposals, it always concluded that it would. And that's collected on Slide 14 in the demonstrative set that the Court has. I won't belabor that.

The supposition that 210 covers costs does not mean that another rate for the service will not also make them money. That's what they've always assessed, and that's what we said.

Mr. Snow talked about the 2018 and showed our admission that they did not reach a new agreement on trackage rights. We admitted they didn't reach a new agreement. That doesn't mean that it's not part of the conspiracy. That's, I think, the distinction there. They didn't reach a new agreement on what the trackage rights would be, and we talked about 70 and 30 and then going to the STB.

Our point is that that whole evolution of conduct is part of the overt acts of the conspiracy. They used the fact that there's a dispute and the prospect of increased trackage fees as a basis to both intend to raise the rate later and to raise issues with our 2018 service proposal.

So the fact that they didn't reach agreement -- the fact that it's in dispute and it's uncertain was used. They didn't need to reach a final agreement. And our interrogatory responses to the extent Mr. Snow suggests that the trackage

rights dispute was not in there, they are listed I think at least twice in our evidence of the conspiracy between Norfolk Southern and NPBL, which was one of their interrogatory responses.

I want to say, just as a legal proposition, Mr. Snow appropriately talked about what actions NPBL personnel did within the statutory period. Under the law, only one act by a conspirator needs to be within the statutory period. So we don't actually need to show overt acts within the statutory period by NPBL. We need to show a conspiracy between the two, for sure, but the overt act only needs be to by one of the conspirators. You would be within the statute just showing one, it does not have to be a joint overt act, you don't have to do one for one defendant and one for the other.

In that regard, the Norfolk Southern-appointed NPBL board directors do qualify as agents of NPBL under Virginia law, or at the very least it's an issue for the jury to assess based on the facts. Mr. Snow, for example, said we never authorized them to engage in conspiratorial conduct. I mean, that's not -- that might be a question he'd ask at trial, but that's not in the record, what their authorization was. What we do know is that they served on that board, they took actions on that board that were, we allege, part of the conspiracy, and it's at least a question of fact whether those actions made them agents of NPBL. The board is itself the literal embodiment of the

corporation.

Mr. Snow's cases talk about that a board can act collectively to bind the company, you know, through a formal board resolution or action, but that's different, I would submit, from qualifying as an agent of the company when you're on its board when you're conducting business and that sort of thing.

THE COURT: So your position is that in 2018, absent any motion by the CSX directors, there were other actions that constituted overt acts?

MR. HATCH: Correct, Your Honor. So --

THE COURT: Now, I mean, you've argued earlier that the vote by the shareholders was an overt act. I've heard the response to that. But beside the vote, what else was there?

MR. HATCH: Well, I think the, besides the vote there's of course Mr. Moss talking about, you know, we've got this trackage rights dispute which is a continuation of that trackage rights agreement. There's the fact that NPBL did not adopt that rate, right? It doesn't -- they can't adopt the rate, they don't adopt the rate, and then at the board meeting, the shareholder meeting and then there's the board meeting, the NS-appointed directors do not -- this is how I think about it: If you are -- as a board director of NPBL, you are responsible for exercising your fiduciary duties in favor of that company. That means to look out for the company's interests, to do what's

good for the company. There's the business judgment rule. But they had a proposal that was going to make them money and they took no action. They're there to impede and to maintain the status quo that keeps us out. And so yes, it's not necessarily a new action, but it's inaction that is causing us harm by not doing what a responsible director would do.

THE COURT: And that's a new overt act?

MR. HATCH: Purposeful inaction.

THE COURT: Inaction is a new overt act.

MR. HATCH: In other words, I think in simple terms, they're blocking us, right? In the most simple terms. We're trying to get into NIT various ways. Rate's too high, you know, they're blocking us, blocking us, blocking us. That's all part of the monopoly. When you're successfully blocking and someone says I want to try to come in, doing nothing, denying that, those are all ways to further the blocking. And that's what they have been doing this whole time. It's the whole constellation of facts around the 2018 proposal that constitutes -- again, we can break them up different ways -- but there are multiple overt acts, whether you attribute them to NPBL, whether you attribute them to Norfolk Southern in that time period.

And they did deny, Your Honor, the governance question, which were wrapped up with achieving the rate in a fair way. So in other words, the business could have approved.

THE COURT: The shareholders denied.

MR. HATCH: They did. Which is an overt act. The business could have approved the rate by itself. They say, oh, well, let's send it to the rate committee. Okay. How about a fair rate committee that would give this fair consideration? They say no. That's the Kolon case. Even if they're contractually obligated, if the reason they're doing that is to perpetrate their monopoly, which our evidence would support, then that's an overt act for the conspiracy.

Just briefly, I think Mr. Snow said it didn't matter that Mr. Moss alerted Mr. Luebbers or communicated with Mr. Luebbers around our train movements. That's a classic fact dispute for the injury jury. In an antitrust case, the fact that two people are communicating that didn't necessarily have business to communicate is evidence, classic evidence of a conspiracy. So the fact that Mr. Moss is telling a Norfolk Southern salesperson we're coming, even if he could have figured that out otherwise, he's keeping him apprised, that is classic evidence of conspiracy. They can argue it was innocent, we'll argue it's evidence of conspiracy. Those are triable issues.

The Court asked a lot of questions, and I won't break them up, about whether you need to have damage in order to secure injunctive relief. And I believe the answer to that is no, you don't have to have -- injunctive relief is equitable and monetary damages are compensatory damages. You don't have to

have monetary damages to qualify for injunctive relief. You can seek a declaratory action and seek injunctive relief with a declaratory action where you wouldn't have monetary damages. What I do think we would need to show is that we have an antitrust claim, right? Even if there's -- even if, assuming, we can.

THE COURT: Does that mean with damages?

MR. HATCH: No, it means you have antitrust injury, which is distinct from damages. So you can show that your -- and this is what Dr. Marvel, another element where I said he testifies as to relevant market and also harm to competition and antitrust injury and then also damages. So I think we would --

THE COURT: What you just said, if I understood you correctly, is all you need to be able to move forward on your injunctive relief claim is to be able to prove an antitrust injury, not damages. Is that right?

MR. HATCH: That's correct, Your Honor.

Well, I guess I was speaking in shorthand. I think you need to prove the elements of an antitrust claim that would then enable injunctive relief. But injunctive relief is equitable; damages is a separate form of relief. So damages is not an element of the antitrust claim necessary to trigger injunctive relief.

THE COURT: Do you have any case that you or your team would point to for that proposition that, even if you can't

recover antitrust damages, that you could still, I guess, go to trial on injunctive relief?

MR. HATCH: Candidly I don't. I haven't sorted the cases that way as I stand here. I'm happy to follow up in that regard with the Court. But if you -- but if you just think -- imagine in 2009 if they said we're going to set this high rate, and imagine that you brought a declaratory action at that time -- they hadn't set it but they had said -- you assume you meet the requirements for a declaratory action, right, case in controversy -- you can bring a declaratory action and seek an injunction prior to incurring any monetary harm.

We're happy to follow up in that regard, but I think that's the basis for my answer to the Court's question.

Your Honor, regarding Ms. Reinhart's argument, I'm happy to answer any questions, but I'll try to go quickly. The Court's been very indulgent with its time. All that was factual material disputed, in my view, and exactly what we would fight about in front of the jury about the contours of the market. And so I'm happy to answer any specific question about trucks versus dray versus New York versus Norfolk, but that's all in our expert reports. Their expert disputes it. That's classic -- we cite it in our brief, that's why relevant market is rarely a basis for summary judgment. That's disputed factual information.

There was a different thread of her argument that

focused on whether our complaint should have alleged it. I thought that was interesting because they didn't move to dismiss our complaint in that regard, nor have ever claimed that it failed to put them on notice. It's notice pleading. So they did not file a 12(b)(6) motion to dismiss on lack of pleading relevant market. They did not, in their 12(b)(1), 12(c) motion to dismiss raise that issue then.

I think this is the first time -- I've heard the argument in the brief that there's a divergence between what the complaint says and what Dr. Marvel says. I think I've addressed that. But the notion that the complaint somehow doesn't put them on notice as to what the relevant market is -- I think has not been presented, and is amply supported by the complaint, which analyzes the market and they didn't challenge it.

Ms. Reinhart talked about the antitrust law's purpose being to protect competition not competitors. I don't think there's a dispute about that. That's why we've educed evidence that the ocean carriers are being hurt by this conduct. They're paying higher prices to Norfolk Southern by virtue of this conduct. That's all set out in Dr. Marvel's report. It also injures us, but we also have evidence that it injures the customers, the ocean carriers.

She and Mr. Snow talked about no one stopped our trains from running in 2015. If you look back at our complaint, the complaint does not allege that our trains literally could

not run; it alleges that they were impeded, delayed. And in this business, if you can't deliver on time, you're not providing the service. And I don't think that's disputed. The fact that a train gets from one place to another, if it take five years, that's not an effective train. You need to move these trains. And they really have not done anything to question the factual disputes around whether those were impeded or delayed, which is what is in our complaint.

There was some question about whether there were allegations about market. I mean, that is in the complaint and that is also in Dr. Marvel's report. And the market share, whether you measure is just based on NIT or whether you measure it based on the Port of Virginia, Norfolk Southern would have monopoly market share either way you measure it. That's all been disclosed. It's all in the complaint or in the discovery material.

Just a quick correction, and I'm sure Ms. Reinhart didn't mean to misspeak on this, I think she said Dr. Marvel's report did not come until after fact discovery. His report came during fact discovery. And fact discovery extended beyond that.

He did assess drayage. That's all in there. I don't want to belabor those points, unless Your Honor has questions about them.

The fact that there can be substitutes at margins or in particular situations does not mean that you haven't defined

a relevant market. That's what the expert's looked at. He looked at all the possible substitutes and determined the market that he did.

I frankly -- she mentioned the VIG facility and how CSX competes at VIG. I think that's the evidence of their anti-competitive conduct. VIG is just across the river, it is fierce competition and open competition, each has on-dock rail at VIG. You come across the river to NIT, it's completely different. Why? No on-dock rail for CSX. And all these proprietary issues and all these kinds of things, I think the Court can just look at Mr. Reinhart's letter and the testimony from the port officials. They want CSX on-dock rail there. They operate that track within the port. They're not saying it's proprietary, they're not saying it's going to be operational issues, they're saying this is good for Virginia and we want them in. It's at least a triable fact.

There was a lot of talk about whether Marvel, Dr. Marvel had analyzed whether the 210 rate was preclusive, he does analyze that. His report's based on evidence and information from other witnesses in the case that it is preclusive to CSX's business. So that is in his report.

And finally, Your Honor, coming back to Mr. Lacy's final discussion, the only thing I wanted to touch on, unless the Court has any questions, is Mr. Lacy talked about there not being direct statements from ocean carriers, that they weren't

deposed directly, that sort of thing. There's ample evidence from CSX personnel about what the carriers expect, what the dynamics of the business are and how it impacts our business for not having on-dock rail at NIT.

You don't have to take our word for it though. As we collected in the complaint, Norfolk Southern repeatedly talks about the benefit of on-dock rail in the railroad competition environment; that you have to go where your customers want you to go; you can't tell them where to move their cargo. On-dock rail is better, and why would they work so hard to preclude competition there if they weren't deriving the very significant benefit that Dr. Marvel says they are.

THE COURT: Let me take you out a bit. Right now the rate issue is at the STB? The status of that?

MR. HATCH: So I want to be specific. The rate that NPBL would pay to Norfolk Southern for trackage rights is at the STB.

THE COURT: And?

MR. HATCH: And stayed.

THE COURT: And CSX took a position there?

MR. HATCH: My recollection is that that did not go very far. CSX did intervene in that proceeding.

THE COURT: And asked it to be stayed?

MR. HATCH: Correct.

THE COURT: Why was that?

MR. HATCH: I'm sorry?

THE COURT: Why did CSX ask to stay that?

MR. HATCH: I should say, Your Honor, maybe I could check with my -- I forget who asked for it to be stayed. I don't want to misspeak on that one. I know it was stayed ultimately.

Mr. Snow says it was CSX, and I'm happy to take his direction on that.

THE COURT: All right. Well, I won't press you. If you weren't sure which one it was, you probably don't know why.

MR. HATCH: Well, we're not counsel in that case, Your Honor. I'm happy to follow up if that's important.

We had brought this case, of course as Your Honor knows, and what the -- and I know the Court also knows this: What the STB had said is this case should go forward, and has also said we should come back to the STB after this case. That was from the referral order.

THE COURT: All right. Thank you.

MR. HATCH: Thank Your Honor.

It's 3:30, and unless there's something really, really big that we've missed, I think it's -- I'm done. You all are done. Thank you.

Madam Clerk, when is the trial scheduled for?

COURTROOM DEPUTY CLERK: Judge, I think it's January 18th.

Yes, sir. January 18th.

THE COURT: How long is it down for?

COURTROOM DEPUTY CLERK: Two weeks.

THE COURT: All right. And you all have an argument tomorrow before Judge Krask on what?

MR. HATCH: It's on two, essentially, *Daubert* motions, Your Honor. They have challenged Dr. Marvel on their part and we have challenged NPBL's proffered expert, Mr. Crowley.

THE COURT: Okay.

MR. SNOW: Your Honor?

THE COURT: Yes, Mr. Snow?

MR. SNOW: I didn't mean to interrupt you, Your Honor. I didn't know if you were finished, but I wanted to just make clear on the record, I know you asked a lot of hypotheticals about possibly allowing CSX to amend. The Belt Line would certainly object to allowing them to amend their damages or any of their overt acts. And I know they were hypotheticals, but I wanted the record to be clear.

THE COURT: Thank you for making that clear.

Well, I don't know that I can really tell you all any more. I think my opening signaled to you what my serious concerns were, and I have tried to drill down on those today, and I obviously need to look further at your responses.

After you meet with Judge Krask tomorrow do you have any other outstanding motions that are scheduled to be ruled on?

MR. McFARLAND: There are a number of pending -- good afternoon, Your Honor. Robert McFarland on behalf of CSX.

There are a number of pending motions, Your Honor, but no hearing is scheduled on the motions *in limine*. Competing *Daubert* motions tomorrow, final pretrial conference next Tuesday on December 6th.

THE COURT: And on those pending motions do you, would you describe any of them as not dispositive, but particularly important?

MR. McFARLAND: There are more from the defendants, so I wouldn't want to mischaracterize on their behalf.

THE COURT: From your side?

MR. McFARLAND: I don't think any of them, Your Honor, would necessarily -- whichever the ruling was -- from our side would necessitate a delay in the trial, no.

THE COURT: Okay. Mr. Lacy?

From your side, Mr. Lacy, any of those motions that you filed that are particularly important to the outcome in preparing for trial?

MR. LACY: Yes, Your Honor. I'll name several.

First we have moved *in limine* to preclude CSX from offering any argument or evidence that the Belt Line's switching rate is unreasonable or excessive. The grounds for those motions as set forth -- the grounds for that argument is set forth in the motion, but to be clear, and as the Court I think

is aware from prior briefing and prior rulings, the STB is the sole authority to determine whether a rate is reasonable or not. And obviously one of the foundational pillars, if not the primary foundational pillar of CSX's case, is that rate is exorbitant, unreasonable. They have used all sorts of descriptions. And we believe that they are not able to do so based on the STB's primary authority. So that's one.

Second, similar to what's been argued here today, and I know Mr. Snow argued it primarily, we have moved *in limine* to prevent argument that the internal email communications of Norfolk Southern reflects communication -- the internal communications of Norfolk Southern including an employee of Norfolk Southern who also was a member of the Belt Line Board at the time can be considered communications between Norfolk Southern and the Belt Line based on those same corporate governance principles that Mr. Snow outline today and the two Virginia Supreme Court cases that we believe to be dispositive on that point.

We have also moved *in limine* to prevent any argument or evidence as to -- and I'm going paraphrase here, Your Honor -- statements from ocean shippers. As I mentioned earlier, no ocean shippers were deposed, none are on the witness list, you will not hear from an ocean shipper.

THE COURT: Doesn't sound like we're going to hear from them, according to Mr. Hatch. He said there's plenty of

testimony coming separately on that.

MR. LACY: Yes. And the thrust of the motion is, and as laid out in the motion, CSX wants to rely on, frankly, rumor and hearsay. You know, I heard from Ocean Shipper X that blah, blah, blah, and introduce that evidence as if that is -- well, offer it for the truth of the matter asserted.

THE COURT: Well, I'm sure there'll be a hearsay objection and it'll be ruled on.

MR. LACY: Indeed. Indeed. But it does -- that is a -- I don't mean to -- it's just foundational because, you know, as Ms. Ryan so eloquently laid out, I mean, this theory of harm requires them to show harm to the ocean carriers.

THE COURT: Okay.

MR. LACY: What else? Oh. We have moved *in limine* to exclude any evidence or argument that the Diamond Track can be considered wrongful conduct. As the Court is aware from the summary judgment record, that removal of that Diamond Track in 2008, it's obviously outside the limitations period, but it also was approved by the Belt Line Board and then subsequently approved by the STB. And so it's our position that CSX should not -- given the federal government agency responsible and required to approve such removals, that cannot be considered an overt act in furtherance of any wrongful conduct.

THE COURT: Okay. Well, thank you. That's all? Those are the main ones? We'll say those are the main ones?

MR. LACY: Yes, those are the main ones.

THE COURT: All right. Okay. Thank you for your arguments, and you will be hearing from me.

(Whereupon, proceedings concluded at 3:43 p.m.)

CERTIFICATION

I certify that the foregoing is a true, complete and correct transcript of the proceedings held in the above-entitled matter.

Paul L. McManus, OCR

Digitally signed by Paul L. McManus, OCR
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Paul L. McManus, RMR, FCRR

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Date